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THREE-JUDGE COURT AND SIX-PERSON CIVIL JURY

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 271

TO IMPROVE JUDICIAL MACHINERY BY AMENDING THE REQUIREMENT FOR A THREE-JUDGE COURT IN CERTAIN CASES, AND FOR OTHER PURPOSES

AND

H.R. 8285

TO AMEND TITLE 28, UNITED STATES CODE, TO PROVIDE IN CIVIL CASES FOR JURIES OF SIX PERSONS, AND FOR OTHER PURPOSES

OCTOBER 10, 1973 AND JANUARY 24, 1974

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THREE-JUDGE COURT AND SIX-PERSON CIVIL JURY

WEDNESDAY, OCTOBER 10, 1973

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE OF THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:17 a.m., pursuant to call, in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Mezvinsky, Railsback, and Smith.

Also present: Herbert Fuchs, counsel; William P. Dixon, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The hearing will come to order. Our Subcommittee on Courts has convened this morning to receive testimony on two bills (S. 271 and H.R. 8285) that are designed, each in its own way, to relax congestion and expedite the administration of justice in our Federal courts. These bills will be placed in the record at this point.

[S. 271 and H.R. 8285 follow:]

[S. 271, 93d Cong., 1st sess.]

AN ACT To improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2281 of title 28, United States Code, is repealed.

SEC. 2. That section 2282 of title 28, United States Code, is repealed.

SEC. 3. That section 2284 of title 28, United States Code, is amended to read as follows:

"§ 2284. Three-judge court; when required; composition; procedure

"(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

"(b) In any action required to be heard an determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

"(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified

mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

"(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment."

SEC. 4. The analysis of chapter 155 of title 28, United States Code, is amended to read as follows:

"Sec.
"2281. Repealed.
"2282. Repealed.
"2283. Stay of State court proceedings.
"2284. Three judge district court; when required; composition; procedure."

SEC. 5. (a) Section 2403 of title 28, United States Code, is amended—

(1) by inserting the subsection "(a)" immediately before "In" and

(2) by adding at the end thereof the following new subsection:

"(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

(b) The catchline to section 2403 of title 28, United States Code, is amended to read as follows:

"§ 2403. Intervention by United States or a State; constitutional question"

SEC. 6. Item 2403 of the analysis of chapter 161, of title 28, United States Code, is amended to read as follows:

"2403. Intervention by United States or a State; constitutional question."

SEC. 7. This Act shall not apply to any action commenced on or before the date of enactment.

Passed the Senate June 14, 1973.

Attest:

FRANCIS R. VALEO,
Secretary.

[H.R. 8285, 93d Cong., 1st sess.]

A BILL To amend title 28, United States Code, to provide in civil cases for juries of six persons, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 121 of title 28, United States Code, is amended by adding a new section 1875 as follows:

"§ 1875. Number of jurors in civil cases

"In a district court of the United States as defined in section 1869(f) of this title, the petit jury shall, in a civil case at law, or in a noncriminal action in which a right to trial by jury is otherwise granted by statute, consist of six jurors, unless the parties stipulate to a lesser number."

SEC. 2. Section 1870 of title 28, United States Code, is amended by striking the first sentence and inserting in lieu thereof the following:

"In a district court of the United States as defined in section 1869(f) of this title, in a civil case at law, or in a noncriminal action in which a right to trial by jury is otherwise granted by statute, each party shall be entitled to two peremptory challenges."

SEC. 3. Section 1869(f) of this title is amended by deleting the words "and 1867", and inserting in lieu thereof "1867, 1870, and 1875".

SEC. 4. The chapter analysis of chapter 121, title 28, United States Code, is amended by adding at the end thereof:

"1875. Number of jurors in civil cases."

SEC. 5. This Act shall become effective on the thirtieth day which begins following the date of its enactment.

Mr. KASTENMEIER. All informed persons appear to agree that the present situation cries out for constructive solutions.

Both measures before us are supported by the Judicial Conference of the United States. S. 271 is a bill to improve judicial machinery by amending the requirement for a three-judge court in certain cases. Introduced by Senator Burdick, this measure passed the Senate on June 14. It sharply reduces the kind and number of situations in which three-judge courts would continue to be required. In so doing, S. 271 to a substantial degree adopts the recommendation of the Chief Justice of the United States who last year told the American Bar Association: "We should totally eliminate the three-judge district courts that now disrupt district and circuit judges' work."

The other bill is H.R. 8285, to amend title 28, United States Code, to provide in civil cases for juries of six persons. H.R. 8285 was introduced by Judiciary Committee Chairman Rodino at the request of the Judicial Conference. It would render uniform the number of jurors in Federal civil cases at six, unless the parties stipulate to a lesser number. S. 2057, a slightly variant measure, is pending in the other body. The bill will be placed in the record at this point.

[A copy of S. 2057 follows:]

[S. 2057, 93d Cong., 1st sess.]

A BILL To amend title 28, United States Code, to provide in civil cases for juries of six persons, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 121 of title 28, United States Code, is amended by adding a new section 1875, as follows:

"§ 1875. Number of jurors in civil cases

"(a) In a district court of the United States as defined in section 1869(f) of this title, the petit jury shall, in a civil case at law, or in a noncriminal action in which a right to trial by jury is otherwise granted by statute, consist of six jurors, unless the parties stipulate to a lesser number.

"(b) In such cases the verdict of the jury shall be unanimous, unless the parties stipulate otherwise.".

SEC. 2. Section 1870 of title 28, United States Code, is amended by striking the first sentence and inserting in lieu thereof the following:

"In a district court of the United States as defined in section 1869(f) of this title, in a civil case at law, or in a noncriminal action in which a right to trial by jury is otherwise granted by statute, each party shall be entitled to two peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges if their interests are similar, or in any such case the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.".

SEC. 3. Section 1869(f) of this title is amended by deleting the words "and 1867", and inserting in lieu thereof "1867, 1870, and 1875".

SEC. 4. The chapter analysis of chapter 121, title 28, United States Code, is amended by adding at the end thereof:

"1875. Number of jurors in civil cases.".

SEC. 5. This Act shall become effective on the thirtieth day which begins following the date of its enactment.

Mr. KASTENMEIER. Our witnesses this morning will convey the views of the Judicial Conference, the Department of Justice, and the American Bar Association. The Chair notes that five witnesses are scheduled to be heard this morning and hopes that the witnesses and the subcommittee members will be as brief as the subject matter permits.

The Chair takes a great deal of pleasure in calling our first witness, the Honorable J. Skelly Wright, Chairman of the Judicial Conference Committee on Federal Jurisdiction, who will speak about S. 271. Judge Wright, you are very welcome. You may proceed.

TESTIMONY OF HON. J. SKELLY WRIGHT, CHAIRMAN, JUDICIAL CONFERENCE COMMITTEE ON FEDERAL JURISDICTION

Judge WRIGHT. Mr. Chairman, gentlemen, I am grateful for the opportunity to appear before you. I appear as a representative of the Judicial Conference of the United States, to express the Conference's views with respect to S. 271 which would repeal sections 2281 and 2282 of title 28 of the Judicial Code.

These sections require the convening of three-judge district courts wherever an injunction is sought restraining the enforcement, operation, or execution of a State or Federal statute on the ground of repugnance to the Constitution of the United States. S. 271 was originally drafted and sponsored by the Judicial Conference. In its present form, it is the same as the original draft of the Judicial Conference except that a three-judge district court for congressional and statewide reapportionment is provided in cases where injunctions are sought.

This legislation concerns, as I have stated, only sections 2281 and 2282. It does not concern the three-judge district court provisions in the Civil Rights Act of 1964 or the Voting Rights Act of 1965, nor does it relate to the three-judge district court required for review of ICC orders.

Nor does it relate to the three-judge district court required under the Expediting Act in antitrust cases. Those later two statutes, the ICC review statute and the Expediting Act provisions relating to three-judge district courts, are the subject of legislation pending in both Houses of Congress, and both Houses are moving in the direction of eliminating the three-judge district court both for ICC review and for review of antitrust actions under the Expediting Act.

So, we speak this morning only of those limited cases which require three judges because an injunction is sought against the operation of a State or Federal statute because of repugnance to the Constitution.

The Judicial Conference has been concerned for many years about the burden of these cases. In the last 10 years, the number of three-judge district court cases under these two statutes has almost tripled. The number of cases, however, does not indicate the actual extent of the burden caused by these cases.

Before a three-judge district court case can even begin, a single judge must recognize it as a three-judge district court case. He must ask the chief judge of the circuit for the convening of a three-judge court. He must certify the necessity. The chief judge of the circuit then studies the certification. If he feels it wisely made, he appoints

two additional judges, one of whom must be a court of appeals judge. Then the three judges must get together in some way. And in many areas of the country, these three judges will live in different parts of the circuit so that the first burden encountered in the convening of three-judge courts is the actual travel of the judges to the place where the trial will be held.

Then, of course, there is the problem of trying a case with three judges. There is the problem of ruling on evidence as the swift-moving events of the trial take place. Three judges cannot act with the same incisiveness as the single judge in making trial rulings as necessary during the trial of a fast-moving case.

In addition to the drain on judicial resources at the district and circuit levels caused by three-judge district courts, the drain on the Supreme Court's limited resources is even greater because the appeals in these cases go directly to the Supreme Court rather than to the court of appeals. And as we all know the number of cases reaching the Supreme Court is increasing each year. These cases are particularly difficult for the Supreme Court because they do not reach the court by application for writ of certiorari. They reach the Supreme Court by direct appeal.

And despite the fact that there is this direct appeal to the Supreme Court, very often courts of appeals are brought into the picture to determine whether or not the single judge has improperly failed to call a court or whether or not a court has been improperly impaneled with three judges. After the court of appeals makes its decision, the case goes back down to the district court where the decision of the court of appeals is implemented and the case starts all over again.

Now, the Judicial Conference would not have taken the position that it has with reference to three-judge courts if there remained any longer the reasons why three-judge district courts were originally created. Three-judge district courts came into being in 1910 as a result of legislation passed at that time. This legislation was a response to rulings by the Supreme Court of the United States which set at naught State legislation that sought to control in the public interest the burgeoning industrial revolution of the time. In a series of decisions led by *Ex parte Young*, the States felt that their processes were being paralyzed by the Supreme Court and so the Congress passed this three-judge legislation to protect the States against acts of one judge who without a hearing of any kind would grant preliminary injunctions restraining States from enforcing their own laws.

Now, the reason for this legislation disappeared almost as soon as it was passed. The equity rules were passed immediately, changing the procedures under which the injunctions were issued. The Congress itself reacted and passed the Johnson Act which prohibited Federal courts from restraining rate fixing by State commissions and the Tax Reform Act which prohibited Federal courts from enjoining State collection of taxes. So at least in these two important areas this three-judge court provision no longer was necessary.

The equity rules have now been written into the Federal Rules of Civil Procedures. In addition, there have been cases decided by the Supreme Court, a trilogy of cases known as the *Younger* v. *Harris* trilogy, which prohibit Federal courts from restraining State courts

in the criminal field. No longer can Federal courts enjoin the enforcement of criminal statutes of the States unless there is obvious harassment on the part of the State official charged with the enforcement of the statute.

And so we suggest—and I am passing through quickly because I know you have a long morning—that the rationale that gave life to the three-judge court in 1910 has all but disappeared. We submit that as a general proposition the original reasons for three-judge courts have been largely dissipated by limiting statutes and decisions controlling the jurisdiction of Federal courts collaterally to review State laws and that the procedure, the three-judge district court procedure, compounds, and confuses rather than simplifies orderly constitutional decisions and that the burden placed on panels of judges to handle these cases on an expedited basis is onerous in view of the mounting backlog of cases of no lesser order of priority.

That concludes my statement, gentlemen. If you have any questions I will be happy to answer.

Mr. KASTENMEIER. Thank you very much, Judge Wright, for a brief but fine statement, certainly to the point. And without objection, sir, your statement as submitted will be placed in the record in its entirety.

The prepared statement of Hon. J. Skelly Wright follows:

My name is J. Skelly Wright, and I appear before your Subcommittee today on behalf of the Judicial Conference of the United States to express the views of the Conference with respect to S. 271, which would repeal 28 U.S.C. §§ 2281 and 2282 of the United States Code. Those sections require the convening of a three-judge district court in cases where an injunction is sought restraining the enforcement, operation or execution of any state or federal statute for repugnance to the Constitution of the United States.

A. THE THREE-JUDGE COURT PROCEDURE CONSTITUTES A SUBSTANTIAL BURDEN ON THE FEDERAL JUDICIARY

The Judicial Conference has for some time been concerned with the increased judicial burden resulting from the convening of three-judge district courts in injunctive cases alleging unconstitutionality of federal or state statutes. In the five years from fiscal years 1965 through 1969, the number of three-judge district courts convened to hear injunctive cases mounting attacks on state statutes has increased over 100 per cent, and the upward trend continues.[1] This burden is an addition to a severe backlog in disposing of cases generally and represents a subtraction from the time judges can devote to their other business.

Before reaching the issue of the continuing need for this special type of panel, I might briefly advert to the special burdens created by three-judge courts. Such a case first involves the time of the district judge in making a threshold determination whether the case is appropriate for a three-judge panel. If he so determines, he must notify the chief judge of the circuit, who must study the pleadings to decide whether the case is indeed one for three judges. If the chief judge of the circuit agrees the case should be heard by three judges, he designates two other judges to sit with the first, one of whom must be a judge of the United States Court of Appeals. The hearing before the three judges must be given precedence and assigned for the earliest practicable day. This means that three federal judges must put aside their other judicial work and travel to one place of holding court and, with triple judge power, decide one case. While the statistical members of three-judge court proceedings are not highly significant, the time consumed by judges on these cases, both in traveling to the place of hearing and in hearing and deciding these cases, represents a serious dimunition of their total time.

After this special three-judge district court has acted, any party may then appeal directly to the Supreme Court of the United States from the decision of

[1] *See* compilation attached as "Attachment A."

the three-judge panel pursuant to 28 U.S.C. § 1253, thereby bypassing the United States Court of Appeals. The Supreme Court must thus dispose of a case, often involving delicate issues of federal-state relationships, on the skeletal record developed in an injunctive suit in the district court, without intermediate consideration by a court of appeals. The burden placed on the Supreme Court of disposing of these appeals, in addition to normal cases heard on the discretionary writ of certiorari, is formidable and has been growing. The time of the Supreme Court is extremely limited, and the direct appeal procedure preempts time which the Court might more profitably utilize on more compelling questions where a conflict of decisions in the courts below has developed. In short, original appellate review should be in the United States Courts of Appeals, as is normally the situation.

Despite this pressure for direct appeal to the Supreme Court, the burden of three-judge courts is not completely removed from the Courts of Appeals which are called upon to resolve the jurisdictional issue on appeal: (1) when one judge has failed to convene a three-judge court and either denies relief or sets the case down for further proceedings, and (2) where a three-judge court itself determines that the case is not properly before it. Since the case is not presented to the Court of Appeals on its merits, the relief granted can only be interlocutory. Thus all three tiers of federal courts are involved in this disruptive procedure.

B. THE ORIGINAL REASONS FOR THE THREE-JUDGE COURT HAVE DISAPPEARED

The original rationale for the three-judge court has long been obsolete and, as one commentator pointed out, began to disappear soon after the original legislator was enacted in 1910.[2] The requirements of a three-judge court were enacted by the Congress in Section 17 of the Act of June 18, 1910, 36 Stat. 539, 557. This legislation was responsive to the situation created by *Ex parte Young*, 209 U.S. 123 (1908), in the wake of which many railroads and utilities attacked state rate-fixing and tax laws, creating a deluge of applications for injunctive relief and races to the courthouse doors. In many cases injunctions were issued *ex parte* by federal judges having the effect of suspending enforcement of such state legislation. The impetus for the legislation was quite clear: the states were resentful of the authority of a single federal judge to nullify their regulatory policies. Under the procedures then in force the judges could issue temporary restraining orders *ex parte* and issue interlocutory junctions on the basis of affidavits alone, and there were no limits in the judge's discretion to continue interlocutory injunctions and temporary restraining orders indefinitely. Section 17 of the 1910 legislation was intended to take this kind of authority away from a single judge and place injunctive suits before a three-judge panel. 45 Cong. Rec. 7253–7257.

The original problems were largely obviated two years after enactment of the 1910 legislation when the federal equity rules were revised, extending to all injunctive cases much the same protective procedures which the 1910 Act had provided for the three-judge court proceeding (*e.g.*, continuance of a 10-day restraining order was prohibited under any circumstances). Later two statutes further restraining the powers of federal courts to enjoin state action were enacted. In the Johnson Act of 1934, 48 Stat. 775 (now 28 U.S.C. § 1342), Congress restricted federal injunctions with respect to state taxes.

Although by the Judiciary Act of 1937, 50 Stat. 732, Congress extended the three-judge requirement to injunctive suits restraining *federal* laws, it did so in a period when numerous cases testing the constitutionality of the economic programs of the Depression years were of prime concern. This, however, was a transitory problem which was largely resolved by the Supreme Court's decisions defining the regulatory powers of the federal Congress. Also, a year after the 1937 Act was passed the Supreme Court decided that a single district judge has not only the power but also the duty to deny a statutory three-judge court when he is convinced that a "substantial constitutional question" is not presented. *California Water Service Co.* v. *City of Redding*, 304 U.S. 252 (1938). This spawned a new kind of litigation since parties could further litigate the jurisdictional issue. The powers of a single judge to dispose of a petition on jurisdictional grounds are to this day obscure, despite a 1942 Act (now codified as 28 U.S.C. § 2284(5)) which presumably would have denied him power to

[2] Ammerman, *Three-Judge Courts: See How They Run!*, 52 F.R.D. 293, 297 (1971).

either dismiss or dispose of the case on the merits. In a 1962 case the Supreme Court held that that statute does not apply "when the constitutional issue presented is essentially fictitious." [3]

The proper channels for appealing the jurisdictional issue are likewise confusing. To quote Professor Wright on the subject:

"The rules on appellate review of whether a three-judge court was needed are so complex as to be virtually beyond belief. The court of appeals may review if the single judge regards the federal claim as so insubstantial as to require dismissal for want of jurisdiction or if the single judge correctly concludes that three judges are not required and decides the merits of the case. If the single judge incorrectly believes that three judges are not required and proceeds to the merits, the remedy once was mandamus from the Supreme Court, but now appears to be an appeal to the court of appeals. If the court of appeals should fail to see that the case was one for three judges, and reviews on the merits, its decision is void.

"If a three-judge court is convened, but it determines that three judges were not necessary, appeal is to the court of appeals. If the special court is correctly convened and gives judgment on the merits, appeal lies directly to the Supreme Court. If judgment is given on the merits by a three-judge court but such a court was not required, appeal should be to the court of appeals rather than to the Supreme Court. * * *" [4]

In summary, the original problems for which the three-judge court was originally conceived have been largely eliminated by reforms in equity procedures now found in the Federal Rules of Civil Procedure. The three-judge court procedure generates rather than lessens litigation. Moreover, the ideal of providing an immediate forum for resolution of constitutional attacks on state and federal laws has been lost in the maze of a procedural jungle.

C. DECISIONAL LAW HAS PROVIDED ITS OWN SAFEGUARDS AGAINST PRECIPITOUS INJUNCTIVE ACTION BY FEDERAL JUDGES

In its recent opinions the Supreme Court has provided such restrictions on federal injunctions as to further obviate the need for three-judge courts. In *Younger* v. *Harris*, 401 U.S. 37 (1971), the Supreme Court held that injunctive relief against a state criminal prosecution is not available except in exceptional circumstances, as where the prosecution is in the nature of a bad faith harassment of the defendant in the exercise of his federal rights.

The Court has also required, as a general proposition, abstention from intervention by injunction or declaratory relief in ongoing state prosecutions,[5] and in situations where the allegedly unconstitutional law has not yet been sought to be enforced against the petitioners and no threat of irreparable injury is demonstrated.[6] The Supreme Court has in other recent decisions mandated abstention from intervention in state criminal processes which have not yet been resolved at the state level[7] or with respect to issues which may be resolved on a different basis in pending state litigation.[8] This pattern of decisions clearly precludes the sort of precipitous intrusion into state legal processes by a single federal judge which the original three-judge court act sought to control.

Thus the rationale which gave life to the three-judge court in 1910 has all but disappeared. We submit that as a general proposition the original reasons for the three-judge court have been largely dissipated by limiting statutes and decisions controlling the jurisdiction of the federal courts collaterally to review state laws, that the procedure compounds and confuses rather than simplifies orderly constitutional decision, and that the burden placed on panels of judges to handle these cases on an expedited basis is onerous in view of the mounting backlog of cases of no lesser order of priority.

Thank you for this opportunity to express the views of the Judicial Conference here today.

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[3] *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962).
[4] C. Wright, Federal Courts § 50 at p. 193 (2d ed. 1970), *See also* J. Moore, Federal Practice ¶ 110.03[3] (2d ed. 1970).
[5] *Samuels* v. *Mackell*, 401 U.S. 66 (1971).
[6] *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971).
[7] *Perez* v. *Ledesma*, 401 U.S. 82 (1971).
[8] *Byrne* v. *Karalexis*, 401 U.S. 216 (1971).

COMPILATION A.—THREE JUDGE COURT HEARINGS BY NATURE OF SUIT, FISCAL YEARS 1963–73

Fiscal year	Total	Review of ICC orders	Civil rights	Suits involving State or local laws or regulations	
				Reapportionment	Other actions
1963	129	67	19	16	27
1964	119	50	21	18	30
1965	147	60	35	17	35
1966	162	72	40	28	22
1967	171	64	55	10	42
1968	179	51	55	6	67
1969	215	64	81	1	69
1970	291	42	162	8	79
1971	318	41	176	2	99
1972	310	52	166	32	60
1973	320	52	183	7	78
Percent change: 1973 over 1972	3.2		10.2	−78.1	30.0

Note: Percent not computed where base is 25 or less.

Mr. KASTENMEIER. For the benefit of the committee, Judge Wright, and for the record, would you tell us something about the Judicial Conference and its composition?

Judge WRIGHT. The Judicial Conference was created by an act of Congress. It is composed of the chief judge of each of the circuits, each of the 11 circuits, and one district judge from each circuit elected by the judges of the circuit so there are 22 members of the Judicial Conference, chaired by the Chief Justice of the United States. And the Judicial Conference functions through committees. There is a Committee on the Criminal Law, there is a Committee on Judicial Administration, and there is a Subcommittee on Jurisdiction of the Court Administration Committee of which I happen to be chairman. It is this subcommittee that drafted the legislation. We sponsored it. The Judicial Conference now is sponsoring it. We have receded from the provision for an absolute repeal of 2281 and 2282 insofar as reapportionment cases are concerned, where those reapportionment cases involve congressional redistricting or statewide reapportionment. That change was added in the Senate Subcommittee on Improvements in Judicial Machinery and the Judicial Conference has now approved the legislation in its present form.

Mr. KASTENMEIER. So, we can note that you have been elected among your peers, I take it to this post.

You testified in the Senate on behalf of a similar measure; did you not?

Judge WRIGHT. Yes, sir.

Mr. KASTENMEIER. Or actually the same one?

Judge WRIGHT. The same one.

Mr. KASTENMEIER. In essence, as I understand it, presently there are two bills pending, H.R. 785 which would repeal the existing requirement that orders of the ICC would be subject to three-judge court proceedings and also S. 782 which would remove cases under the Expediting Act from three-judge court requirements. I assume the Judicial Conference supports both of those measures?

Judge WRIGHT. The Judicial Conference has supported both of those measures in the past.

Now, the ICC legislation has been the subject of much discussion between the Department of Justice and the ICC, the Commission itself.

And I am not familiar with the bill in its present form because the controversy there seems to be as to who will be the named party in review whether it be the United States or the Commission. What turns on that is who represents whom in the court of appeals, whether it be the Commission lawyers or the Department of Justice lawyers. Now, that is what held the bill up for several years and I understand that that problem has been resolved.

So the Judicial Conference has in the past approved all versions of the ICC review bills which eliminate three-judge district courts.

Mr. KASTENMEIER. Do I understand that the Judicial Conference does not object to continuing the three judge court requirements that come up under the Voting Rights Act of 1965 and the Civil Rights Act of 1964?

Judge WRIGHT. That matter has not come before the Judicial Conference. The number of cases generated from those statutes is miniscule and it is a matter of no great concern.

Mr. KASTENMEIER. But I would assume on principle the Judicial Conference is for the total elimination of three-judge courts except when you mention the reapportionment or redistricting cases? And does the Conference make a distinction in these two classes of cases?

Judge WRIGHT. The Conference has not been called upon to consider any proposed changes in the three-judge district court provisions in the Civil Rights Act of 1964 or the Voting Rights Act of 1965. And consequently the Conference has taken no position with reference to any proposed changes. I know of no such proposals and consequently I am not able to speak for the Judicial Conference with reference to that matter.

Mr. KASTENMEIER. Does the Judicial Conference object to the three-judge courts as a matter of principle or does it specifically address itself only to three-judge courts under certain statutory requirements?

Judge WRIGHT. Well, I think the Judicial Conference would have to study any proposal, for example, for changing the three-judge provisions of the 1964 Civil Rights Act. A case might be of such concern and importance that it should be treated in the first instance by a three-judge district court. For example, under the 1964 Civil Rights Act only the Attorney General can ask for a three-judge district court and that legislation provides that a three-judge district court shall be convened when the Attorney General asks for it in cases where he finds a pattern of discrimination in employment, et cetera, and consequently the Congress thought that this was an area of such importance that in the first instance a three-judge district court ought to consider it with the direct appeal to the Supreme Court, which would expedite the conclusion of the litigation. Now, it is conceivable that a three-judge district court would still be appropriate in those kinds of cases, but I am not in a position to speak for the Judicial Conference in connection with this particular subject.

Mr. KASTENMEIER. Precisely, what action did the Judicial Conference take in connection with three-judge courts or in connection with repeal of 28 United States Code sections 2281 and 2282?

Judge WRIGHT. Precisely the Committee on Court Administration drafted legislation which would repeal 2281 and 2282. That legislation was approved by the Judicial Conference and copies of the proposal were sent to the Judiciary Committee of the House and the Judiciary Committee of the Senate.

This was several years ago, and it has been the subject of legislative consideration since that time.

Mr. KASTENMEIER. To put your position into a rather different context then, is it your position or the position of the Conference that these provisions are now a burden as far as continuing the three-judge district courts is concerned but that certain others including the Voting Rights Act of 1965 and the Civil Rights Act of 1964 and reapportionment or redistricting cases might not be a burden?

Judge WRIGHT. That is correct. The Conference addressed itself to the burden, exactly. The Conference does not want to challenge the wisdom of the Congress of the United States in deciding who and by how many judges cases should be heard.

The Conference does want to call to the attention of the Congress the burden that results from multiplying the judge power required in particular cases and the Conference's view was and is that under 2281 and 2282 the burden is very great.

Over 95 to 97 percent of the three-judge cases, with the exception of ICC cases, come from 2281 and 2282 and the Judicial Conference was therefore moved on its own initiative to draft legislation to have 2281 and 2282 repealed.

Mr. KASTENMEIER. I understand. And as a matter of fact it does not speak affirmatively of the retention of other three-judge courts other than 2281 and 2282?

It is merely silent as to whether those courts should continue, if as a matter of congressional policy as to whether those might still be necessary, is that correct?

Judge WRIGHT. That would be accurate, Mr. Chairman.

Mr. KASTENMEIER. Do any statistics exist which might be useful for us to justify to our colleagues in terms of judge man-hours or cost in dollars, the saving of which would justify affirmative action on this bill?

Judge WRIGHT. We have made no studies as far as I know, time studies with reference to three-judge district court cases. All we have with reference to them is our experience and the bare statistics as to the number and the increasing numbers. And as I indicated the number has trebled in the last 10 years. As far as the reapportionment cases are concerned, they are not a problem. There were only seven in the last fiscal year, 1973, and only one or two in fiscal 1971.

Mr. KASTENMEIER. Thus far, Judge Wright, I am not aware of any and I would ask you do you know of any cogent argument that could be made for the retention of three-judge courts under section 2281 or 2282 by potential litigants or others? Are you aware of any argument that could be made for retention,

Judge WRIGHT. I would think that if the same conditions which caused the passage of the legislation in 1910 came to pass again, there would be a basis for considering the legislation. You remember that legislation related only to attacks on State laws. In 1937, 2282 was

passed and that involved attacks on Federal laws. There were conditions in 1937 which justified its passage and if those conditions recurred I would think that serious consideration should be given to doing something about them. In other words, where I think the Congress has a right to determine in its own mind whether or not there has been an abusive power on the part of other branches of government, where it has jurisdiction in the area, then it can act to correct what it feels is a vice.

Mr. KASTENMEIER. Thank you, Judge.

I yield to my friend from California, Mr. Danielson.

Mr. DANIELSON. I have no questions, Mr. Chairman. Thank you, Judge Wright.

Judge WRIGHT. Thank you.

Mr. KASTENMEIER. I would like to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Judge Wright, I wonder if you have any idea what passage of this bill would mean as far as cutting down on appeals, direct appeals to the Supreme Court? I wonder, do you have any idea, or is it possible to project what this would save as far as your caseload is concerned?

Judge WRIGHT. Well, actually the number of cases going to the Supreme Court from three-judge district courts really is only 3 percent of the Supreme Court's calendar, overall calendar. But, the great majority of cases reaching the Supreme Court reached the Supreme Court on an application for a writ of certiorari and those cases as you know do not always result in appeals or hearings before the Supreme Court. As a matter of fact, less than 1 in 10 actually result in any work before the Supreme Court other than the action on the application itself. So, even though the percentage is small, the amount of work required by the Court in these three-judge cases is relatively large because, as I have indicated, these are direct appeals. Again, we have no time study which would indicate just how much of a Justice's time is spent with these cases.

Mr. RAILSBACK. And it would also save some time as far as the courts of appeals are concerned, because they would not have to decide the jurisdictional questions so it really would help to cut the caseload of both the Supreme Court and the court of appeals, is that correct?

Judge WRIGHT. Yes. The jurisdictional aspects of three-judge courts present a real problem.

One judge is asked for three-judge court. The chief judge of the circuit says no and then where do you go from there?

One judge gets his three-judge district court and then they decide that three judges really are not necessary. And then do you go to the Supreme Court or do you go to the court of appeals? It has been very unsatisfactory. Maybe there is a better way to do it but it has not been done properly up to this time.

Mr. RAILSBACK. Let me just ask you one last question. The bill before us does not repeal section 1253 which relates to the direct appeals from decisions of three-judge courts. I will just read it to you.

It says "Expect as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying after

notice and hearing an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a district court of three judges."

We still are leaving intact a three-judge court in certain cases like the reapportionment cases, and also the voting rights cases and civil rights cases. I am just wondering, trying to recall if those cases, the civil rights cases, are those characterized as civil cases where they are seeking injunctive relief?

Judge WRIGHT. Yes they are and you have read the statute right. Direct appeal to the Supreme Court would be preserved in those cases where three-judge district courts are preserved. But as I have indicated before the number of such cases is very small.

The reapportionment cases were seven last year and the number of the ones under the Civil Rights Act was even fewer, if my recollection is right, as well as the ones under the Voting Rights Act. So those cases really have not presented a problem. The cases that do present the problem, and that is merely because of the numbers, are the cases that arise under 2281 and 2282.

And I might say also that there is no opposition really to this bill as far as we can tell. The subcommittee in the Senate on Improvements in Judicial Machinery sent letters to the Attorney General of every State in the Union and asked for their comments on the bill, because there was some thought that perhaps because three-judge district court legislation had its genesis in protecting the States, there would be some reason why the States might want to retain the legislation; 38 attorneys general did not even answer the request of the subcommittee and of the other 12, 3 were in favor of the legislation, and about half a dozen misconstrued what the legislation was all about and there were 1 or 2 who really were opposed to it.

Mr. RAILSBACK. Then in addition the sponsors of the bill are really providing some additional protection for the States by giving them notice where as now they would not be getting such notice in certain cases?

Judge WRIGHT. Not only notice, but the right to intervene on the part of the Attorney General.

Mr. RAILSBACK. Right. The right to intervene. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much for coming. Judge Wright. It is very nice to have you here.

Judge WRIGHT. Thank you.

Mr. DRINAN. One question I have about the incidence of civil rights litigation for a three-man district court. In the compilation after your fine statement, I see that civil rights in the last 10 fiscal years, with three-judge Federal courts, has increased from 19 in fiscal years 1963 to 183 in 1973. And it is very interesting to note that between 1969 and 1970 the number of civil rights cases with three-judge courts doubled from 81 to 162. I do not fully understand, therefore, your statement when you say that the incidence of three-judge Federal courts in civil rights cases is miniscule.

Judge WRIGHT. I was referring to the special three-judge district court cases under the Civil Rights Act of 1964, not under 2281 or

2282. I was referring only to those limited civil rights cases, for three-judge district court cases provided for in the Civil Rights Act of 1964 where the attorney general may ask for a three-judge district court in cases where he finds a pattern of discrimination in employment, in schools, or whatever. But that is a very limited, very limited group. There have been some under the Voting Rights Act of 1965 certainly as you know. But under the 1964 act there have not been any or any greater number.

Mr. DRINAN. Judge, would your proposed statute touch that particular area?

Judge WRIGHT. Not at all. Not at all.

Mr. DRINAN. All right. So, these 183 under civil rights would not be touched by this proposal you make?

Judge WRIGHT. Not at all.

Mr. DRINAN. You would be relieved by the ICC orders of 52 each year but then on the others, the 78, would all of them or most of them be taken care of by your proposal?

Judge WRIGHT. The ICC orders are the subject of other legislation which hopefully will pass soon. The other part of the statement is correct.

Mr. DRINAN. Seventy-eight would be eliminated?

Judge WRIGHT. Yes.

Mr. DRINAN. Well, I always find you very persuasive, judge, and I see no difficulty in accepting what you said so eloquently today. Thank you.

Judge WRIGHT. Thank you.

Mr. KASTENMEIER. Just a follow up then on the line of inquiry pursued by Mr. Drinan. In fact, under your present figures, we would be relieving the court, the court system, of providing a three-judge district court in 78 of 320 cases, in somewhat less than 25 percent of the cases, and the burden under present figures would be relieved so we should not misunderstand that this is the lion's share of the cases. It is, in fact, a minority of the cases, a quarter of them perhaps?

Judge WRIGHT. Maybe my mathematics are inaccurate, but this is the lion's share of the cases. The only case, looking at the compilation for 1973, fiscal 1973, the total of the three-judge cases, district court cases, is 320. Only 52 are ICC orders. Those 52 would not be affected by S. 271.

Mr. KASTENMEIER. Right.

Judge WRIGHT. The seven reapportionment would not be affected. But, all of the others, more or less all of the others would be affected, with the possible exception of any voting rights cases under the Voting Rights Act of 1965 that might be included in the other actions.

Mr. KASTENMEIER. I understood you to reply to Mr. Drinan, in reply to Mr. Drinan to say that the civil rights cases numbering 183 would not be affected by this legislation. Did I misunderstand you?

Judge WRIGHT. I did not intend to say that if I did. What I did intend to say was that civil rights cases brought under the special provisions of the act of 1964 which require a three-judge district court when the Attorney General of the United States certifies the necessity—they would not be affected and the number of such cases has been very, very small.

Mr. KASTENMEIER. Let me put the question this way to you, Judge Wright. How many civil rights would be affected, that is, how many

civil rights cases are presently brought to a three-judge district court under 2281 and 2282? That of course we need to know.

Judge WRIGHT. In fiscal 1973 I would say close to 183.

Mr. KASTENMEIER. So all of those, all of those—well, so that the three-judge district court would not be available for civil cases under 2281 or 2282 henceforth and that presently is nearly 183 cases?

Judge WRIGHT. That is correct.

Mr. KASTENMEIER. And I think that raises a question. Do civil rights advocates accept this change? Do they know about it and do they realize they will not have the option of having a three-judge district court under 2281 and 2282 henceforth?

Judge WRIGHT. I understand that the Civil Rights Commission, at the time it was chaired by Father Hesburgh, was contacted informally by the Subcommittee of the Senate Judiciary on Inprovements in Judicial Machinery and asked for its views on S. 271. It dit not take a position against it, and so I would assume that this is a fairly good indication that the civil rights people across the country are satisfied now to have one Federal judge handle their cases initially.

Mr. KASTENMEIER. Yes. The only reason someone might infer a different response on their part is the fact that as recently as fiscal 1972 they have been employing or entering into three-judge district courts in as much as 183 cases. more than half the total consisting of requests for three-judge district courts, and, therefore, one must believe that they feel that this is a desirable and favorable forum for them.

So it may be that the Civil Rights Commission has decided it can forgo the three-judge district court but one still is left with the impression that currently it is being widely used in civil rights cases by some litigants.

Judge WRIGHT. The figures here would support exactly what you say.

[Subsequently, Judge Wright submitted the following.]

U.S. COURT OF APPEALS,
Washington, D.C. October 10, 1973.

HON. ROBERT W. KASTENMEIER,
Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: At the hearing this morning you pointed out that of the total of 320 three-judge district court cases for fiscal 1973, 183 were "civil rights" cases, as shown in the statistics compiled by the Administration Office of the United States Courts. You also suggested that if the civil rights litigants in these 183 cases chose a three-judge district court, it might be possible that civil rights groups who bring such cases would be opposed to S. 271. I regret that I was not quick enough to make a proper response to your suggestion. When an action is brought for an injunction restraining the enforcement of a state or federal statute on the ground of unconstitutionality, under 28 U.S.C. §§ 2282 a three-judge district court is required. The litigants have no choice. Both Section 2281 and Section 2282 state that such an injunction "shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

I am advised that the Administrative Office is going to furnish the Subcommittee with a breakdown of the 183 three-judge district court cases filed in fiscal 1973 shown in its compilation as involving civil rights. It appears that a large number of the 183 cases are only tangentially related to civil rights.

It was a pleasure to appear before your Subcommittee this morning.

Sincerely,

J. SKELLY WRIGHT.

Mr. KASTENMEIER. Thank you.

Mr. DRINAN. Could I? Would the chairman yield for just a minute?

Mr. KASTENMEIER. Yes.

Mr. DRINAN. I am afraid I misunderstood Judge Wright. If that is the case and if I may pursue this just a moment I am looking forward to the testimony here of Mr. Dixon for the Department of Justice where on page 8 he says that S. 271 would not eliminate all three-judge courts. Such courts would be retained in certain ICC cases and certain civil rights cases. I am still uncertain which civil rights cases will be retained and which will not. Am I to understand that all 183 of these cases would henceforth be ineligible for Federal three-judge Federal courts?

Mr. KASTENMEIER. If I understood the response to me it was that only insofar as they are pursuing under 2281 or 2282 which have been the lion's share of the 183 current cases.

Mr. DRINAN. Well in view of that Mr. Chairman I would suggest that the Leadership Conference be asked to testify or to submit a statement and that other activist groups that do in fact litigate on behalf of civil rights and civil liberties be given notice of this hearing and that we get their views on the matter.

Mr. KASTENMEIER. I yield to the gentleman from Iowa.

Mr. MEZVINSKY. I just want to thank Judge Wright and I have no questions Mr. Chairman.

Mr. KASTENMEIER. If there are no further questions we are grateful to you, Judge Wright, for your appearance this morning. And the chair will say we will try to ascertain whether or not there is any interest, following the suggestion of Mr. Drinan, among civil rights litigants in retention of the three-judge district court.

Judge WRIGHT. I think that that would be an excellent idea. If three-judge district court cases are still being sought by civil rights litigants then they ought to be heard first to determine whether or not they believe the three-judge district court should be retained to protect their interests.

Mr. KASTENMEIER. Thank you, Judge.

Judge WRIGHT. Thank you, gentlemen.

Mr. KASTENMEIER. The Chair would next like to call on the Honorable Edward J. Devitt, chief district judge of St. Paul, and the Honorable Arthur J. Stanley, Jr., senior district judge, Leavenworth, Kans.

May I say I would ask you both to come up and each make a separate presentation, but because it is my understanding that the thrust of your presentations is very much in the same area it might be useful to ask you both to appear in tandem before the committee.

We appreciate your appearance this morning, and may I ask Judge Devitt, who is listed first, to proceed.

TESTIMONY OF HON. EDWARD J. DEVITT, CHIEF DISTRICT JUDGE, ST. PAUL, MINN.; AND HON. ARTHUR J. STANLEY, JR., U.S. SENIOR DISTRICT JUDGE, LEAVENWORTH, KANS.

Judge DEVITT. Mr. Chairman and members of the committee, this is a nostalgic occasion for me because 26 years ago I sat on the House Judiciary Committee and in fact, Judiciary Committee No. 3.

Mr. KASTENMEIER. As a matter of fact, I did not know that and I am pleased to know that. Times have changed greatly and the composition of the committee is very different.

Judge DEVITT. All of my colleagues have left with Mr. McCullough and Manny Celler leaving. I really did not sit on the committee be-

cause at that time in 1947, in the Old House Office Building there were only 26 seats on the dais and there were 28 Members and the lowest Member on one side, and I , the lowest Member on the other, sat in large red chairs on the sidelines. So, during my abortive career I never was really elevated as you gentlemen are.

Mr. KASTENMEIER. It took me, I think, five terms to rise from the lower echelon to the higher echelon of chairs of the Judiciary Committee.

Judge DEVITT. My statement will take about 3 minutes. I will file a summary of it.

Mr. KASTENMEIER. Without objection, your statement will be received and made a part of the record and you may proceed.

[The statement of Judge Devitt follows:]

TESTIMONY OF EDWARD J. DEVITT, CHIEF JUDGE, U.S. DISTRICT COURT, DISTRICT OF MINNESOTA IN SUPPORT OF H.R. 8285, PROVIDING FOR SIX-MAN JURIES IN CIVIL CASES BEFORE JUDICIARY COMMITTEE, U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE NUMBER 3, WASHINGTON, D.C., OCTOBER 10, 1973

I urge favorable consideration of H.R. 8285 providing for uniform six person juries in all civil cases with two peremptory strikes a side. Our District of Minnesota was the first to adopt a six-man jury rule, in November 1970. Rules providing for juries of less than 12 members now have been adopted in sixty-three districts and on June 21, 1973, the United States Supreme Court in *Colgrove* v. *Battin*, 93 S. Ct. 2448, approved the practice.

In the three years since the District of Minnesota adopted its six-man rule, I have corresponded and conferred with fifty or more United States district judges concerning rules providing for juries of less than twelve persons.

These contacts lead me to conclude that the judges operating under rule providing for less than twelve person juries have been completely satisfied with them. These judges report that implementation of such rules results in an appreciable saving of time for the court and its supporting personnel in calling, impaneling, interrogating, polling and otherwise managing the jury panel. Six jurors move in and out of the jury box in a shorter time than twelve. Six examine exhibits during trial more quickly and it is likely, though difficult to substantiate, that six come to a unanimous decision more quickly than twelve. Our experiences indicate a substantial cost reduction through the use of the six-man jury.

Our experience in Minnesota also indicates that the verdicts of smaller juries are just as reasoned and sound, and are based on the same care and consideration of the evidence and faithful observance to the court's charge as are the verdicts of the traditional twelve-man jury.

The United States Supreme Court has expressed confidence in the reliability of verdicts reached by juries of less than twelve. Justice White observed in *Williams* v. *Florida*, 339 U.S. 78, 90 S.Ct. 1893 (1970):

"* * * Certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size."

The Court concluded there is little reason to think that the proper goals of the jury

"* * * are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained." *Williams*, p. 1906, S.Ct.

The practicing Bar in Minnesota has expressed general satisfaction with the rule. Similarly my fellow judges report that counsel in other sections of the country have accepted similar rules in a similar manner.

The six-man jury rule is well on its way to becoming a recognized part of trial practice in the federal courts and, in my view and experience, is a meritorious improvement in judicial administration.

But legislation such as H.R. 8285 is needed to achieve a very desirable uniformity in jury size and practice in each of the federal districts and to reduce the number of peremptory challenges from three (now required by 28 U.S.C. 1870) to two to comport with the smaller size of the jury. I also favor retention of the requirement for unanimity unless the parties stipulate otherwise.

I urge favorable action on the proposed legislation.

Judge DEVITT. Thank you, Mr. Chairman.

The district of Minnesota was the first district to adopt the six-man jury rule and we did that in November of 1970. Since that time there have been 63 district courts out of the 94 which have adopted rules providing for juries of less than 12 persons. All of those rules in the 63 districts are not the same however.

I represent to the committee that in the 3 years since we have operated under the rule I have spoken to, I suppose, between 50 and 100 U.S. district judges about rules providing for juries of less than 12 persons. And almost uniformly they favor these rules. They report to me that the lawyers in their various districts express general satisfaction. The gist of their satisfaction is that the courts and supporting personnel save appreciable time in calling, impaneling, interrogating, polling, and otherwise managing the jury and a meritorious byproduct is that a substantial amount of money is saved by virtue of it.

The district courts now, by virtue of the Supreme Court decision, are able to go ahead and operate under the six-man jury rules. But, there are two single reasons why this bill should be passed.

One of them is to achieve uniformity and the second one is to reduce the number of preemptory challenges from three on a side which is now required by the law to two on a side to more nearly comport with the balance of the total size of the new six-man jury.

I know of no opposition to the rule. There was opposition to the Supreme Court deciding that we had authority to adopt the rule, but the Supreme Court has now said it is a proper thing to do.

I think it is essential now that we have uniformity in the Federal system, and I think it is essential that we reduce the number of preemptory challenges on the present six to a total of four.

So, I urge favorable consideration of this legislation.

Mr. KASTENMEIER. Thank you, Judge Devitt.

Judge Stanley, you may proceed, sir.

Judge STANLEY. Thank you, Mr. Chairman.

Mr. KASTENMEIER. In any way you choose.

Judge STANLEY. I, too, have submitted a prepared statement, and heeding the chairman's admonition, I would like, if it is all right, to just briefly summarize that statement at this time.

Mr. KASTENMEIER. Without objection, the Chair is pleased to receive and make a part of the record a 17-page statement by Judge Stanley.

[The statement of Judge Stanley follows:]

STATEMENT OF SENIOR DISTRICT JUDGE ARTHUR J. STANLEY, JR., CHAIRMAN OF THE JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, IN FAVOR OF H.R. 8285, BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMMITTEE ON THE JUDICIARY

Mr. Chairman and Members of the Subcommittee, I am Judge Arthur J. Stanley, Jr. of the United States District Court for the District of Kansas, and appear here today in my role as Chairman of the Committee on the Operation of the Jury System of the Judicial Conference of the United States. I appreciate the invitation to testify in support of H.R. 8285, and to convey the Conference's recommendation that the bill be enacted, but with the suggestion that the provisions in S. 2057 relating to unanimity, and peremptory challenges in multiple party cases be substituted in H.R. 8285.

I preface my remarks with the statement that the Judicial Conference has thrice recommended legislation providing for six-member juries in civil cases. At its April 1972 session, the Conference supported H.R. 13496, then pending

in the 92nd Congress; and at its April 1973 session, the Conference indicated its support of H.R. 8285 as introduced in the first session of the 93rd Congress. It has again endorsed H.R. 8285 as its Setember 1973 session with the additional suggestion indicated above in a letter forwarded to the Chairman of your Committee.

In a landmark decision of June 22, 1970, the Supreme Court in *Williams* v. *Florida*, 399 U.S. 78, held that the Sixth Amendment does not require a twelve-member jury in a state court criminal prosecution. With extensive documentation in the footnotes, the Court found that history afforded few if any reasons why the number of jurors has been fixed at twelve. The religious explanation by Lord Coke of the number of twelve—twelve apostles, twelve stones, twelve tribes, etc.—was not persuasive to the Court, nor was the explanation that the number twelve was chosen because that was the number of the presentment jury from the hundred, from which the petty jury developed. Rather, the Supreme Court concluded that the twelve man feature of the jury appeared "to have been an historical accident, unrelated to the great purposes which gave rise to the jury in the first place."

While *Williams* did not reach the issue of whether a six-person jury was permissible in a civil case under the Seventh Amendment, and various related statutes and rules, that issue was resolved in *Colgrove* v. *Battin*, 413 U.S. 149, handed down on June 21, 1973. In *Colgrove*, the Court concluded that additional references to the "common law" which occur in the Seventh Amendment, do not support an interpretation that would engraft a specific number—a formal characteristic—within its provisions. The Court found that a jury of six satisfies the Seventh Amendment guarantee, noting:

"What is required for a 'jury' is a number large enough to facilitiate group deliberation combined with a likelihood of obtaining a representative cross section of the community.... It is undoubtedly true that at some point the number becomes too small to accomplish these goals, but, on the basis of presently available data, that cannot be concluded as to the number six." [1]

Colgrove thus firmly established that the number twelve is imbued with no more magic with respect to the right of trial by jury under the Seventh than the Sixth Amendment. The fact that the ancients, with an eye to the twelve signs of the Zodiac or the twelve phases of the moon, may have found twelve to be a fortuitous number, has not been considered of sufficient evidentiary weight to crystallizing the size of a petit jury at that number.

On the basis of these Supreme Court decisions sustaining the legality of smaller juries for the trial of civil cases, 63 district courts have provided for juries of less than 12 by local rule of court. I should point out that these local rules in no way obviate the need for this bill. Its passage will create that necessary uniformity and equality of treatment which is accorded all litigants in our federal courts. Further, it would eliminate any tendency for forum shopping by those who believe that verdicts are a function of size, and would reduce and make uniform the number of peremptory challenges to comport with the lesser size of the jury (which requires an amendment of present 28 U.S.C. 1870). Passage of the bill would tend to dispel any brooding legal problems that are present when there exists a diversity of jury procedures in two or more districts where a case may be originally filed or between which a case may be transferred. Finally, passage of the bill would quiet the objection found in the dissenting opinions of Justices Douglas and Powell in *Colgrove* v. *Battin* that creation of six-man juries by local rules exceeds the rulemaking power of the district courts, and would at least meet one criticism posed in Mr. Justice Marshall's dissent (joined by Justice Stewart) that:

"In the past, we have therefore given great deference to legislative decisions in cases where the line must be drawn somewhere and cannot be precisely delineated by reference to principle."

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[1] In *Colgrove* v. *Battin*, the Supreme Court in fact found affirmative evidence that no substantial difference exists between twelve and six-man juries. The Court noted (Slip Op., p. 11, footnote 15):

"In addition, four very recent studies have provided convincing empirical evidence of the correctness of the *Williams* conclusion that 'there is no discernible difference between the results reached by the two different-sized juries.' Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Reform 671 (1973); Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts (1972); Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Reform 712 (1973); Bermant & Coppock, Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington, 48 Wash. L. Rev. 593 (1973)."

The legal issue, however, does not control the policy issue: Are there substantial advantages in reducing the size of a civil jury which offset the advantages of a larger participation by the citizenry in the judicial process? We think there are.

I should make clear at the outset that we are not now suggesting any diminution in the size of the federal criminal jury; such a reduction would be governed by entirely different policy considerations. It might be useful first to describe these differences.

First, the issue in a criminal case is essentially a public one, relating as it does to an accusation of public wrong, for which a sanction may be imposed. There is more validity in the argument that a panel drawn to judge the facts of a public crime and to render a verdict on behalf of the people of the United States should represent a broader spectrum of the population. Every person has a stake in a criminal trial. The framers of our Constitution, therefore, broadly extended the right of trial by jury to *all* criminal cases, except for the most minor Public participation in such trials thus was made explicit by Article III, Section 2, and the Sixth Amendment to the Constitution.

The right of trial by jury in civil litigation, however, was limited. The jury trial guarantee of the Seventh Amendment extends only to "suits at common law where the value in controversy shall exceed twenty dollars . . .", thus denying the right of jury trial in minor litigation (by standards of the late 18th century), as well as in the courts of equity and admiralty, which obviously were not and are not less important than suits for damages in the courts of law. The principal function of the jury in civil cases is to adjudicate disputes of *private* rights arising principally between private individuals. The requirement of proportional representation of all segments of the community on the jury panel is less critical than in the criminal case where a matter of general public concern is at issue.

Some practical illustrations may be useful. In fiscal year 1973, the great majority—approximately 68%—of civil jury cases handled by the federal courts were tort cases (2,437 of a total of 3,607 civil trials). The questions in these cases are generally concerned with whether one or more of the parties acted negligently; whether the negligence was the proximate cause of property or personal damages; and the amount of these damages. Judgments on such issues do not necessarily call for a broad consensus of the entire vicinage, but an *ad hoc* judgment of the merits of a narrow controversy between very few persons. Why cannot six, as adequately as twelve, decide that a driver failed to use reasonable care in entering an intersection? The quality of judgment is not an arithmetical function of the number making the judgment. The six will have been just as carefully questioned on voir dire examination to detect any cause for challenge as would the twelve. Each of the six will be called upon to resolve the same issue and to exercise a dispassionate judgment in reaching their verdict. Note also that under the Jury Selection & Service Act of 1968, any jury must be selected at random from voter lists as a cross-section of the greater community. This will maintain the melange of diverse viewpoints—economic, social, racial, and so forth—upon which the concept of a right to trial is based. In short, the trust that we propose in the jury is not diminished by reduction of the group from twelve to six.

ADVANTAGES OF REDUCTION

Those with empirical knowledge of the functioning of a smaller jury state that the use of such juries saves time in the selection process and is less expensive.[2]

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[2] Joiner, "Jury Trials—Improved Procedures," 48 F.R.D. 79 (1969). Tamm, "The Five-Man Civil Jury: A Proposed Constitutional Amendment," 51 Georgetown L. J. 120 (1962). Tamm, "A Proposal for Five-Member Civil Juries in Federal Courts," 50 A.B.A.J. 162 (1964). Six-Member Juries Tried in Massachusetts District Court, 42 J. Am. Jud. Soc. 136 (1958). Phillips, "A Jury of Six in All Cases," 30 Conn. B. J. 354 (1956). Wiehl, "The Six-Man Jury," 4 Gonzaga L. Rev. 35 (1968). Angelli, "Six-Member Juries in Civil Actions in the Federal Judicial System," 3 Seton Hall L. Rev. 281 (1972). Devitt, "The Six-Man Jury in the Federal Court," 53 F.R.D. 273 (1971). Crooke, "Memorandum on the Admissibility and Constitutionality of Six-Man Juries and 5/6 Verdicts in Civil Cases," 44 N.Y.S.B.J. 385 (1972). Kaufman, "Harbingers of Jury Reform," 58 A.B.A.J. 695 (1972). Cronin, "Six-Member Juries in District Courts," Boston Bar J. (April 1958). "New Jersey Experiments With Six-Man Jury," ABA Bull., Section of Judicial Administration, May 1966, at 6. Thompson, "What is the Magic of '12'?" 10 Judges' Journal 88 (1971). Lumbard, "Let the Jury Be—But Modified," 7 Trial 17 (November–December 1971). Administrative Office of the United States Courts, Jury Utilization in the United States Courts. Maryland State Bar Assn. of Judicial Administration Section Council, Committee on Juries Report (Balti., Md. 1971), 20 pp.

These are cogent observations since a 50% reduction of the jury size greatly diminishes the number of names that must be considered from the first stage of the qualifying process, at the point when names are taken from voter lists, up to the time when a jury panel is ultimately summonsed to a particular trial part. Since often dozens of names must be used to get one name qualified for jury service any diminution in the ultimate number needed reduces the amount of valuable court-clerk time spent in the selection process by reducing the number of mailings of qualification forms, summonses, and other communications, as well as other time spent in jury administration.

A reduction in jury size also can reduce the number of persons actually summonsed for a specific trial part. The number actually sent to the hearing room is frequently over twice the number needed for jury service because of challenges, alternates, disqualifications, excuses, etc. Thus, a reduction from twelve to six would result in a reduction of twelve or more in the jury panel initially sent to the trial part.

A reduction in the size of the jury should lessen the amount of juror time spent waiting in the assembly room because a smaller group can be more easily and quickly assembled and sent to trial parts. A frequent complaint received from jurors concerns the tedium of endless hours of waiting to serve. Indeed, in fiscal year 1973, 43.5% of paid juror time was spent not in hearing cases but in "standing by".

Additionally, the voir dire examination of smaller groups expedites the entire process of examination and challenge. The diminution in jury size coupled with the bill's reduction from three to two of the number of peremptory challenges allowed to each side will reduce the time spent by judges, attorneys, and jurors in conducting voir dire examination.

The expense of calling larger panels is an important consideration and represents a substantial portion of the judicial budget. In passing the Jury Selection and Service Act of 1968, Congress allowed jurors a fee of $20 per day plus transportation and subsistence expenses where appropriate. This increase made it additionally important that the limited funds appropriated to the Judiciary be wisely employed. A reduction of the size of civil juries is a move in that direction.

The savings in administrative effort, in waiting time, in time needed to assemble jury panels and send them to jury parts, and in time needed to conduct the voir dire will be a factor in reducing the tremendous backlog in civil jury trials. Each succeeding year reveals more civil cases filed than terminated. Last year (1973), there was a 0.3% increase in pending civil cases over the year before. This small increase is almost a reversal in the upsurge in civil pending cases. This was the smallest year-to-year increase since 1959 when federal district courts recorded 63,796 pending cases compared to 101,333 at the close of fiscal year 1973. This represented an increase of 59% in the last 15 years. For federal civil jury trials, the median time between the point when issue is joined and the commencement of actual trial is 14 months, although this time was as high as 33 months in one district during 1973 (Pa.E.). The reduction of the jury size would aid the effort to eliminate extreme delay in jury trials. As United States Circuit Judge Edward A. Tamm pointed out a decade ago:

"Modern conditions, i.e. ever increasing congestion and delay in the federal courts, mounting costs—monetary and social—of the jury system necessitate its serious reform in the interest of efficiency and economy if the jury system is to survive." [3]

COMMENTARY OF JURISTS AND LEGAL WRITERS

Probably the most compelling argument for the reduction of the size of the civil jury is the favorable reaction of the federal judges who have conducted trials with six-man juries. Chief Judge Edward J. Devitt, a pioneer in this area, reported to the Eighth Circuit Judicial Conference on June 28, 1971:

"The successful use of six-man juries in civil cases in the Federal District Court of Minnesota has resulted in improved efficiency at less cost without sacrifice of legal rights and argues for nationwide employment of juries of less than twelve in civil cases in the Federal courts.

"The Minnesota experience, although based on a limited period of five months of actual operation, has evoked expressions of complete satisfaction with the

[3] Tamm, "The Five-Man Civil Jury: A proposed Constitutional Amendment", 51 *Georgetown L. J.* 120 (1962).

innovation from judges, lawyers and litigants, has materially shortened trial time, increased judicial efficiency and resulted in substantial financial saving to the government in jurors' fees and expenses.

"The Judges of the Court have been completely satisfied with the new Rule. The practice under it permits an appreciable saving of time for the Court and its supporting personnel in calling, impaneling, interrogating and otherwise managing the jury panel. Obviously it takes less time to poll six jurors than twelve. Six move in and out of the jury box in a shorter time. The same time saving is true in the jurors' examination of exhibits during trial. It is also likely, but difficult to substantiate, that six can come to a unanimous decision more quickly than twelve."

Conversations with other judges who have had experience with smaller juries reaffirms a belief that this bill is a wise and well-considered move toward greater efficiency and fairness in the jury trial process.

The Administrative Office of the United States Courts is conducting continuing studies of juror utilization and will undoubtedly have more detailed information on utilization statistics for those courts that have adopted the six-member civil jury. The Administrative Office of the United States Courts has projected cost savings for budgeting purposes in the use of six-man civil juries. I understand that its report on this subject will be submitted as a separate exhibit to this committee. However, it might be said generally that given efficient jury utilization and given the fact that the smaller jury results in smaller panels called to the courtroom, the savings in juror fees and other costs of maintaining juries would inevitably follow.

There is, of course, some opposition. One highly eminent commentator, Professor Hans Zeisel of the University of Chicago, disputed the arguments of *Williams* v. *Florida* and its conclusion that a smaller jury would save time and money. His thesis was that even without specific data, it is possible to demonstrate that the six-member jury must be expected to perform quite differently than the twelve-member jury.[4] Other commentators have been critical of the *Williams* case, arguing that size may affect the outcome of the verdict.[5] These arguments, however, have more validity in assessing the effect of reducing the size of a criminal jury, with which we are not here concerned. Moreover, as I have previously noted, the Supreme Court in *Colgrove* stated that it was unpersuaded that there is a discernible difference between the results reached by the two different sized juries.[6]

It is unnecessary to reexamine the validity of *Williams*, or the proposition that public attitudes toward crime and punishment are so polemic as to require representation of a larger spectrum of diverse attitudes in the jury panel. That observation is not wholly relevant to the limited fact-finding function of a civil jury in any normal situation. Predisposition to bias in a civil case is not a function of jury size, and certainly is not rarer in a jury of twelve than a jury of six. The rational method of eliminating bias is not by increasing the size of the jury, but by challenging those prospective jurors who reveal some predisposition to bias at voir dire. I would venture that if any presumption is permissible it would be that it is easier to find six than twelve objective jurors.

Moreover, there is no evidence that a *civil* jury of six will perform differently than one of twelve, or that decisions on the issues of fact as they affect two private parties would vary, or that any private litigant would be otherwise disadvantaged by having his case presented to the smaller panel. Indeed, a study completed by the Institute of Judicial Administration indicates that there is no disparity in performance. The study was performed in New Jersey Superior and County courts, where the parties may choose a jury of either six or twelve, and involved 492 six-member juries and 180 twelve-member juries. Ninety-seven percent of the judges responding to a questionnaire indicated they believed either a six-member jury was more appropriate or not of consequence. Moreover, the instance of agreement by the judges with the jury's liability verdict and award of damages was substantially the same for the six and twelve-member juries. Lawyers were of the view that the size of the jury affected the verdict in less than ten percent of the cases sampled. In light of this apparent equality

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[4] Zeisel, "And Then There Were None: The Diminution of the Federal Jury," 38 *U. of Chi. L. Rev.* 710 (1970).

[5] Note, "Effect of Jury Size on Probability of Conviction—An Evaluation of *Williams* v. *Florida*," 22 Case Western L. Rev. 529 (1971); Note, "Defendant's Right to a Jury Trial—Is Six Enough?", 59 Ky. L. J. 997 (1970–1971).

[6] See footnote 1, *supra*.

of performance, it is highly advantageous to the civil litigant who has an interest in reducing his skyrocketing litigation costs to have the case processed more expeditiously and inexpensively.

At the outset, I mentioned that the Judicial Conference at its September 1973 session made two suggestions for additions to H.R. 8285 to include two features suggested by a pending Senate bill, S. 2057. The first of these suggestions is that statement in S. 2057 that in civil cases:

". . . the verdict of the jury shall be unanimous, unless the parties stipulate otherwise.", should be incorporated in H.R. 8285. This would assure that less than unanimous verdicts of six-man juries would not be mandated in the federal jury system. This provision would preclude at the federal level the sharp clash of opinion on the subject of unanimity of state jury verdicts reflected in the Supreme Court's decisions in *Johnson* v. *Louisiana*, 406 U.S. 356 (1972), and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972).

The second suggestion relates to peremptory challenges. The Conference clearly favors the reduction of peremptory challenges in civil cases from three to two, but feels that the situations presented in multi-party litigation are so diverse, that some discretionary flexibility should be given the trial judge. The following language is therefore recommended as an addition to H.R. 8285:

"Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges if their interests are similar, or in any such case the court may allow additional peremptory challenges and permit them to be exercised separately or jointly."

CONCLUSION

We believe that H.R. 8285 in no way dilutes the ancient right to trial by jury of civil cases. Rather, it fortifies that right. Faced with a serious backlog of civil cases, the time lag in reaching a case for jury trial has been extended increasingly. During this period of delay, witnesses disappear, evidence is lost, and memories fade, while attorneys' fees rise.

The Federal Judiciary is constantly attempting to reduce the time lag between the filing of a complaint in the civil case and the trial day. Smaller juries undoubtedly will be a major step in this effort. At the outset, fewer names of potential candidates need be considered. The total number of persons summoned for jury service can be reduced. The panels sent to trial parts can be smaller and more manageable. By virtue of both the smaller jury size and the reduction in peremptories, the time spent on voir dire by the parties will be decreased. A final consideration, one for which it is impossible to state a dollar savings, is the improved juror morale that should result when fewer jurors are consigned to endless waiting in the assembly room.

Finally, the financial saving involved is important because the cost of selecting and impanelling petit jurors represents an appreciable portion of the limited Federal Judicial budget. This factor is not controlling as a rationale, but assumes some importance when considered with the advantages of greater efficiency in utilizing jurors.

I thank you on behalf of the Judicial Conference of the United States and its Committee on the Operation of the Jury System for this opportunity to appear today in support of H.R. 8285.

Judge STANLEY. I appear in my role as chairman of the Committee of the Judicial Conference on the Operations of the Jury System. Judge Wright explained the makeup of the Judicial Conference of the United States. The Committee on Operation of the Jury System, the members of that committee, are appointed by the Chief Justice and include representatives from all of the circuits, all of the 11 circuits. That committee considered bill 8285 and reported favorably on that bill at the last session of the Judicial Conference in September.

And I am here to convey the recommendation of the Conference that the bill be enacted but with the suggestion that the provisions which appear in S. 2057, be added to House bill 8285.

Now, those provisions are provisions providing for unanimity of the six-man jury and further providing where there are parties of

similar or joint interests that the Court may decide whether only two, whether the two challenges, preemptory challenges be exercised or severally. So the recommendation of the Conference is that the bill be enacted, respectfully suggesting the amendment as now appears in S. 2057.

Now, the Conference has supported the concept of the six-man jury system earlier in supporting House bill 13496, then pending in the 92d Congress and at the April 1973 session supported this bill, and at the September 1973 session endorsed the bill with the additional suggestion of requiring unanimity of the jury and providing for a joint exercise of the challenges in multiple-party cases.

The decision of the Supreme Court in *Williams* v. *Florida* held that a 12-man jury in the State criminal prosecution was not constitutionally required. Then, as Judge Devitt has indicated, following his suggestion, a great many of the districts, I think at that time about 58 of the 94 had adopted rules providing in various ways for a jury of less than 12, some of them 8, but most of them 6-man juries. The question that was hanging over all of us then was whether this provision, provided by court rule, violated the constitutional provisions of the seventh amendment of the Constitution.

The Supreme Court in *Colgrove* v. *Battin* at 413 U.S. 149, resolved that question. I think the important thing is, to me, at least, that 63 of the districts, of the 94 districts, have adopted some form of a jury, some form of rule providing for a jury of less than 12. Now, this indicates I think in itself the support of the courts for this concept. And like Judge Devitt, I have not talked to nearly so many people as he has, but I have attended some of the circuit conferences and among the judges and the lawyers who have had experience with the six-man jury, under the various rules, that experience as reported to me, has been good.

Certainly it has been good in my district, the district of Kansas, and the bar accepts it and the judges like it.

The reason for supporting this bill, the reason of the Conference, is, as I think Judge Devitt indicated that it would provide for uniformity in the various districts where as now we have various rules and would make it a general rule rather than a rule applicable to only some districts, which leads to forum shopping and that sort of thing and is generally unsatisfactory.

Now, the statistics, it is rather difficult to compile statistics for many reasons. First is that the rules differ in the different districts and then when panels are called generally they are called to try a calendar both of civil and criminal cases and in criminal cases 12-man juries are utilized so that while it may be possible we have not yet been able to assemble figures showing the economies by the use of the 6-man jury or a jury of less than 12.

Now, Mr. McCafferty with the Division of Information Systems of the Administrative Office of the U.S. Court has compiled figures resulting from a study of 16 district courts which have adopted less than 12 member civil juries. If I have been saying 12 man, forgive me. It should be 12 members or 12 persons.

The reasons for making this study of the 16 district courts is that the 16 districts are districts which have had experience both in 1972

and 1973 with juries of less than 12. Those figures are available and I would like to submit as an exhibit here the study made by Mr. McCafferty.

Mr. KASTENMEIER. Without objection, the study to which you refer will be received and made a part of the record.

[The study follows:]

[Memorandum]

OCTOBER 2, 1973.

To: Mr. Imlay, General Counsel, A.O.
From: Mr. McCafferty, Assistant Chief, Division of Information Systems, A.O.
Subject: Trial data and jury usage data in sixteen district courts which have adopted less than twelve-member civil juries.

In response to your request we selected sixteen (16) districts all of which in late fiscal year 1972 or in early fiscal year 1973 adopted local rules providing for less than twelve members to sit on a civil jury trial. These 16 were selected to enable us to compare costs before and after initiation of the reduced size civil jury.

We drew up a statistical statement on these sixteen districts. Our analysis is of the attached statistical statement includes the number of civil and criminal trials completed, jury trial days for civil and criminal trials (a jury trial day is a single day of a trial by a jury), the jury usage index (which is obtained by dividing the total available jurors by the number of jury trial days), and the cost per day of jury trial for both fiscal years 1972 and 1973.

The findings are:

I. JUROR UTILIZATION INDEX (JUI)*

In 11 of the 16 districts, the juror utilization index improved (a lower JUI) in 1973 over 1972. In 3 districts the index rose marginally, and in the remaining 2 the JUI increased about 4 index points, indicating a poorer performance.

Looking at it another way, of the 11 districts with declines in JUI, 4 had JUI's which were under the national average of 20.96 in 1972 and 6 districts had JUI's under the national average of 20.16 in 1973. Three of the 11 districts showed a decided change from having higher than average JUI's in 1972 to having lower than average in 1973. Five of the 11 districts actually carried higher JUI's than the national average in both years.

Of those whose JUI's were higher than the national average in 1972, the Northern District of Florida reduced its index from 23.97 in 1972 to 14.92 in 1973, or a decrease of nine index points in one year. In this year, the Northern District of Florida moved from being the 72nd ranked district in the JUI to the 10th ranked out of a total of 94 districts. It did this in spite of an increase in completed jury trials.

The Eastern District of Virginia, which in both years had higher JUI's than the national average, showed a drop in its JUI from 25.44 in 1972 to 21.95 in 1973, or 3.5 index points lower.

Of the two districts which experienced increases in their JUI in 1973 over 1972, Vermont and Eastern Washington, both continued to have indexes which fell below the national average for the two years. It appears that the increase in the indexes for both districts can be attributed to criminal trials which require larger voir dires and a jury of twelve members plus one or two alternates.

In summary, the majority of these districts have lower JUI's than the average for the nation, and in two districts where the JUI increased, their indexes were still below the national average for both years.

II. JUROR COSTS

In 10 of the 16 districts, costs per day of jury trial dropped in 1973 as compared to 1972. Cost savings ranged from $52 in the Middle District of Louisiana to $267 in the Eastern District of Oklahoma. The average savings in cost per day of jury trial in these 10 districts in 1973 over 1972 was $131.

*The Juror Utilization Index is obtained by dividing the total jurors called for service by the number of jury trial days. This index thus takes into account all jurors summoned for jury duty (and paid) and is the measure recognized by practitioners in this field as the most reliable measure of the efficient use of jurors.

For the 6 districts with increased costs in 1973, the increases ranged from $10 more per day of jury trial in Western Washington to $141 in Eastern Washington; almost all of it is traced to an increase in criminal jury trials. The average increase in cost per day of jury trial in these 6 districts in 1973 over 1972 was $64.

In summary, jury trial day costs declined an average of $131 in 10 districts, and rose by $64 in 6 of the districts. In terms of overall savings between 1972 and 1973, these districts showed a decline of an average of $58 each in costs. But more importantly, with these savings, there were 105 more completed trials and 411 more jury trial days. Had the rate of expenditure in 1972 been continued into 1973, the cost in 1973 would have been $1,682,031 rather than $1,513,527. Thus, in 1973 the savings in these 16 districts to the taxpayer was $168,504.

III. SUMMARY

There are various combinations of factors which have improved juror utilization. Some of these are smaller voir dires as well as multiple voir dires, jury pooling, staggered trial starts, recycling of jurors, establishment of settlement and plea deadlines, and improved communication. With these must be coupled the effect of the civil jury of less than twelve members. It can be stated that in these 16 districts, the majority have improved their juror utilization with substantial savings passed on to the taxpayer.

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Alabama, Northern									
1972	5/10/72	223	198	25	418	360	58	15.87	$524.00
		Percent of Total	88.8	11.2	Percent of Total	86.1	13.9		
1973		167	139	28	364	276	88	13.45	$460.00
		Percent of Total	83.2	16.8	Percent of Total	75.8	24.2		Percent change -12.2
Alabama, Middle									
1972		72	30	42	148	70	78	18.46	$626.00
		Percent of Total	41.7	58.3	Percent of Total	47.3	52.7		
1973	7/12/72	90	32	58	160	60	100	18.54	$665.00
		Percent of Total	35.6	64.4	Percent of Total	37.5	62.5		Percent change 6.2
Connecticut									
1972		66	18	48	245	84	161	17.55	$434.00
		Percent of Total	27.3	72.7	Percent of Total	34.3	65.7		
1973	10/17/72	84	30	54	257	90	167	16.06	$376.00
		Percent of Total	35.7	64.3	Percent of Total	35.0	65.0		Percent change -13.4

*Arranged alphabetically

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Florida, Northern									
1972	6/29/72	73	10	63	119	17	102	23.97	$573.00
		Percent of Total	13.7	86.3	Percent of Total	14.3	85.7		
1973		85	17	68	171	36	135		$353.00
		Percent of Total	20.0	80.0	Percent of Total	21.1	78.9	14.92	Percent change -38.4
Florida, Middle									
1972		125	29	96	312	72	240		$780.00
		Percent of Total	23.2	76.8	Percent of Total	23.1	76.9	23.35	
1973	9/27/72	136	33	103	413	119	294	21.84	$577.00
		Percent of Total	24.3	75.7	Percent of Total	28.8	71.2		Percent change -24.1
Iowa, Southern									
1972		33	10	23	98	30	68	20.33	$515.00
		Percent of Total	30.3	69.7	Percent of Total	30.6	69.4		
1973	7/28/72	53	19	34	183	71	112	15.88	$450.00
		Percent of Total	35.8	64.2	Percent of Total	38.8	61.2		Percent change -12.6

*Arranged alphabetically

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscel year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Kentucky, Western									
1972	4/24/72	68	38	30	112	68	44	25.38	$579.00
		Percent of Total	55.9	44.1	Percent of Total	60.7	39.3		
1973		69	31	38	171	59	112	20.88	$575.00
		Percent of Total	44.9	55.1	Percent of Total	34.5	65.5		Percent change 16.6
Louisiana, Middle									
1972	4/16/72	18	7	11	19	9	10	30.74	$716.00
		Percent of Total	38.9	61.1	Percent of Total	47.4	52.6		
1973		13	9	4	14	10	4	21.57	$664.00
		Percent of Total	69.2	30.8	Percent of Total	71.4	28.6		Percent change -7.3
Mississippi, Northern									
1972		54	31	23	98	59	39	25.79	$886.00
		Percent of Total	57.4	42.6	Percent of Total	60.2	39.8		
1973	9/27/72	52	18	34	131	47	84	21.70	$656.00
		Percent of Total	34.6	65.4	Percent of Total	35.9	64.1		Percent change -26.0

*Arranged alphabetically

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Missouri, Western									
1972		65	24	41	181	88	93	25.25	$589.00
		Percent of Total	36.9	63.1	Percent of Total	48.6	51.4		
1973	7/1/72	101	28	73	268	80	188	25.51	$601.00
		Percent of Total	27.7	72.3	Percent of Total	29.8	70.1		Percent change 2.2
Oklahoma, Eastern									
1972	4/14/72	30	13	17	58	36	22	26.66	$815.00
		Percent of Total	43.3	56.7	Percent of Total	62.1	37.9		
1973		32	13	19	54	29	25	19.61	$548.00
		Percent of Total	40.6	59.4	Percent of Total	53.7	46.3		Percent change -32.8
Vermont									
1972		27	25	1	118	86	32	15.80	$386.00
		Percent of Total	96.2	3.7	Percent of Total	72.9	27.1		
1973	10/17/72	87	79	8	312	190	30	19.32	$672.00
		Percent of Total	90.8	9.2	Percent of Total	86.4	13.6		Percent change 22.3

*Arranged alphabetically

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Virginia, Eastern									
1972	5/22/72	179	73	106	311	127	184	25.44	$525.00
		Percent of Total	40.8	59.2	Percent of Total	40.8	59.2		
1973		185	78	107	303	136	167	21.95	$418.00
		Percent of Total	42.2	57.8	Percent of Total	44.9	55.1		Percent change -20.4
Washington, Eastern									
1972		23	15	8	71	44	27	15.17	$396.00
		Percent of Total	65.2	34.8	Percent of Total	62.0	38.0		
1973	7/1/72	18	3	15	51	7	44	19.79	$537.00
		Percent of Total	16.7	83.3	Percent of Total	13.7	86.3		Percent change 35.6
Washington, Western									
1972		68	20	48	224	87	137	17.72	$450.00
		Percent of Total	29.4	70.6	Percent of Total	38.8	61.2		
1973	7/1/72	71	20	51	196	70	126	18.74	$460.00
		Percent of Total	28.2	71.8	Percent of Total	35.7	64.3		Percent change 2.2

*Arranged alphabetically

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Wyoming									
1972		29	12	17	66	39	27	14.50	$315.00
		Percent of Total	41.4	58.6	Percent of Total	59.1	40.9		
1973	8/21/72	15	7	8	53	30	23	12.19	$247.00
		Percent of Total	46.7	53.3	Percent of Total	56.6	43.4		Percent change -21.6
1972									
		Percent of Total			Percent of Total				
1973									Percent change
		Percent of Total			Percent of Total				
TOTAL GROUP I									
1972		1,153	554	599	2,598	1,276	1,322	20.69	$559.00
		Percent of Total	48.0	52.0	Percent of Total	49.1	50.9		
1973		1,258	556	702	3,009	1,310	1,699	19.05	$503.00
		Percent of Total	44.2	55.8	Percent of Total	43.5	56.5		Percent change -10.0

*Arranged alphabetically.
Source: Administrative Office of the U. S. Courts.

Judge STANLEY. Well, I have nothing else, I believe, that I would offer now, except, of course, my statement which you have been kind enough to receive.

Mr. KASTENMEIER. Thank you very much, Judge Stanley and Judge Devitt for a concise and cogent explanation of why a six person jury in civil cases is desirable in the federal system.

Has H.R. 8285 been the product of the Judicial Conference. I wonder what the genesis of it is if it is not that?

Judge STANLEY. I think that it was initially. It was initially the Judicial Conference proposal. They proposed it in its present form, so that if these suggested additions should be added there, their absence is the fault of the Judicial Conference rather than any fault of the bill.

Mr. KASTENMEIER. In other words, S. 2057 represents the latest amended version of the recommendations of the Judicial Conference?

Judge STANLEY. That is correct.

Mr. KASTENMEIER. Rather than H.R. 8285, is that correct?

Judge STANLEY. That is correct.

Mr. KASTENMEIER. Why does the Conference feel that the requirement of unanimity is essential?

Judge STANLEY. I think that basically it is because lawyers are worshippers of tradition and naturally fear any tampering with the jury system and this would spell out what I think could fairly be inferred from the bill, that unanimity is required unless stipulated. Of course, the parties may stipulate to accept a jury of a lesser number.

Mr. KASTENMEIER. I would like to ask Judge Devitt whether he, or perhaps Judge Stanley could comment as well, is aware of any objection to the six-man, six person jury on the part of any organization or any individuals who might be litigants or might have recourse to a jury and wonder about the quality of justice?

Judge DEVITT. Yes, there is opposition. Professor Zeisel of the University of Chicago Law School, for instance, is vigorously opposed to it. He was opposed to the Supreme Court decision in 1970 which germinated all of this and then he was opposed to the decision last June in *Colgrove* v. *Battin*. I think his argument is that traditionally we always have had the 12 man jury, that it came from England, and they always had a 12 man jury and we should have a 12 man jury. Of course those arguments are answered by the Supreme Court in those two decisions.

Mr. DRINAN. Mr. Chairman——

Judge DEVITT. He also urges that—I yield to you, father.

Mr. DRINAN. No. I just wonder whether that 5 to 4 decision by the Supreme Court could go the other way when you have the dissenting views by Justices Douglas, Powell, Marshall, and Stewart and you could not characterize as the liberal or the activist group necessarily. So, I am just wondering whether the Congress should say that it is all settled. As I read *Colgrove* v. *Battin*, it is not settled by any means.

Judge DEVITT. It is settled by one vote, and I suppose many decisions are made by one vote, Mr. Drinan. It seems to me that there is no opposition to this bill. There is marked opposition to what the Supreme Court said but there are many times opposition to what the Supreme Court has said. The purpose of this bill is to achieve uniformity. It does no good for lawyers to go to different districts and find different rules; to go to western Pennsylvania, for instance, and find they have an 8-man jury and then to go to about 12 of the districts which have 6-man juries and find that they only apply to diversity, FELA and Jones Act cases, and then to go to all of the rest of the districts and find that they have a straight 6-man jury. Certainly uniformity is a very desirous thing and the principal purpose of this bill, as I see it, is to achieve uniformity in the system.

Mr. KASTENMEIER. Besides uniformity, of course, we will be confronted with the fundamental question of what sort of justice is thereby rendered. And while historically, as I understand it, there is very little justification for the figure "12," nonetheless it is a matter of long held practice in law to have a jury of 12. As judges, how do you accept the figure "6" in terms of working with the jury and terms of the quality of justice? How do your colleagues assess any number whether it is 6, 4, 8, or 12?

What criteria do you employ to ascertain whether one number renders effective judgments and justice and findings, or whether as a judge you find it easier or more efficient to work in terms of the administration of justice?

Judge STANLEY. Well, jury management is much easier with the six. Now, Professor Zeisel rather ridicules the idea that there is much time saving and makes a very interesting and very readable argument on that, but, actually, there is just a built-in inherently a great deal of time saving when you are dealing with only 6 people rather than 12.

Now, as to the quality of the justice, I do not know how anyone can answer that question. I do not know how anyone can say that we should not have a jury of 100. I think that it is just arbitrary, and there must be some figure. Now, I have heard no complaints from lawyers who have tried cases—initially I should not say that. Initially I did hear

some complaints and there again you get back to the desire of lawyers not to depart from the things that have worked in the past. Perhaps it is laziness. I do not know. I think that enters into it. But, certainly lawyers are tradition bound and they have always known the jury of 12. So, I did hear some complaints but from those who actually tried the cases, those same ones, a good many of them have said well, it was all right and these were both representing plaintiffs and defendants in personal injury tort cases.

Mr. KASTENMEIER. I take it as far as the elusive quality of justice is concerned your comment is that there is no evidence that it would be diminished in fact? There is no evidence that any figures renders better justice?

Judge STANLEY. I would say that is correct although I must say in all honesty that Professor Zeisel argues that the representation of minority groups would be better on a larger jury than on a smaller one and statistically that probably would work out. But, my experience has been that preemptory challenges give the parties considerable power over the group that finally sits in the box.

By exercising those challenges they can generally effect that.

Judge DEVITT. Mr. Chairman, may I read a short paragraph which is the Supreme Court's observation about the question you asked? This is from *Williams* v. *Florida*. Justice White said: "Certainly the reliability of the jury as a fact finder hardly seems likely to be a function of its size."

The Court concluded that there is little reason to think that the proper goals of the jury "are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained."

Mr. KASTENMEIER. Yes. I appreciate that.

Judge DEVITT. And many States, ever since that decision, have adopted six-man juries.

Our own State of Minnesota did it, for instance, right after the decision.

Mr. KASTENMEIER. I take it you have no view on whether practically, as opposed to constitutionally, whether a six man jury panel would be desirable in criminal cases?

Judge STANLEY. Yes. The Conference has a view on that.

Mr. KASTENMEIER. What is the view of the Conference?

Judge STANLEY. The Conference, at its last session, considered Senate bill 288 which does provide for a jury of less than 12 in criminal cases and the Conference went on record as approving that bill, except for the provision that it apply to criminal cases, so, in effect, the Conference took a position that the 12-man jury should be retained in all criminal cases.

Mr. KASTENMEIER. And why did it take that position? Do you think it raises constitutional problems?

Judge STANLEY. It might, yes. But, beyond that, I think this entered in certainly as far as the committee was concerned. And I think so far as the Conference was concerned, that in civil cases the dispute is between individuals, Smith sues Jones. In criminal cases, the public is a party and has a definite interest and there would be a better ac-

ceptance of criminal justice if we retained the time honored 12-man jury system.

Mr. KASTENMEIER. To the extent that the view of the Conference prevails does it not tend to answer the fear that the instant legislation would be a foot in the door for the reduction in size of criminal juries?

Judge STANLEY. So far as the Conference is concerned that is true.

Mr. KASTENMEIER. I yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. The reason I am smiling, which I rarely indulge myself in, is that I have arrived at the same end as you have, Judge, on the 12-man criminal jury, but from an entirely different direction. Your reasoning of the position of the Conference or the council is that the public has an interest in a criminal prosecution; therefore, justice would better be served with a 12-person jury. Maybe the interests of personkind would be better served. I arrive at it from a different direction. I think the consequences of criminal prosecution are so overwhelming insofar as the defendant is concerned, that he is entitled to every break he can possibly get, and if that means 12 people, fine. I am much more concerned in other words, with the defendant than I am the public.

But, we arrived at the same place.

Judge STANLEY. Very good.

Mr. DANIELSON. As to the six-man jury, you mentioned one of the arguments for the opposition, at least to the argument for unanimity, was that lawyers seem to be reluctant to have a change and we have had unanimity for a long time. Do you have any statistics that would indicate to what extent unanimity is required in the verdict in civil actions in state courts?

Judge STANLEY. I do not have them. I do not know whether they are available or not. They could be compiled.

Mr. DANIELSON. It was my impression that in most State courts today in civil actions you do not require unanimity of verdict and maybe I am wrong. It is just an impression.

Judge DEVITT. A substantial number of the States have the five-sixths verdict. We do in my State.

Mr. DANIELSON. Pardon me?

Judge DEVITT. We have that in my State for instance and sometimes the lawyers, accustomed to the State practice, will come into the Federal court and ask you to instruct the jury on the five-sixths verdict because they have grown accustomed to it.

Mr. RAILSBACK. To what?

Judge DEVITT. A five-sixths verdict, you know, 10 out of 12 and if the lawyers are accustomed to it they like it and if they are not accustomed to it, then they fear it.

Mr. DANIELSON. In my State, and I come from California, we cannot have less than a unanimous verdict in civil actions.

Let me ask you this. In your Conference was there input of practicing lawyers as opposed to judges and professors?

Judge STANLEY. In the Judicial Conference?

Mr. DANIELSON. Yes.

Judge STANLEY. There are no lawyers on the Conference. The Congress has set this as Judge Wright explained.

Mr. Danielson. Would it be permissible to infer from that that maybe it was not a reluctance on the part of the lawyers but a reluctance on the part of judges and professors to alter the Conference?

Judge Stanley. Well, I hardly know how to answer that, Mr. Danielson.

Mr. Danielson. Well, I am approaching it from this point: if there are no lawyers on the Conference, can we very well attribute the Conference's position to the reluctance on the part of lawyers? It is food for thought at least.

Judge Stanley. Yes. Well, I think that Mr. Campbell of the American Bar Association is here. I do not know what his testimony will be with respect to this.

Mr. Danielson. The American Bar Association has no input on the Conference either, does it?

Judge Stanley. No, no.

Mr. Danielson. Why is it that the Conference would like to have the subparagraph in Senator Burdick's bill, sub(b) at the top of page 2 requiring unanimity? Does it consider this point significant enough to be embedded in our law here?

Judge Stanley. Yes. The committee felt that it was and the Conference felt that it was and here again, of course, there is a difference in the different State systems and in that connection Mr. Imlay advised me that he feels sure that the Supreme Court considered this question because there was a State case of *Apodaca* v. *Oregon* in 406 U.S. 404, and there was some discussion of that and I think if my memory serves me correctly that in the footnotes they tabulate those States which do require the unanimous verdict.

I think this is just a matter of judgment and I want to go back, if I may, to your earlier question. This bar does have an indirect input. Each of the circuits of the United States is required to have a judicial conference each year and at that conference in most circuits, not all, but in most circuits, and I think the number is growing, the bar is invited to attend. And these matters are discussed and not only at sessions of the conference but as the lawyers get together like in between sessions and these matters are discussed. And I know the six-member jury concept has been discussed widely at those conferences. And I think Judge Devitt has been practically to all of them discussing it and debating.

Mr. Danielson. I have not tried a lawsuit now for a number of years. I do seem to remember however, that a number of years ago in diversity cases for example, in court action, the counsel for the plaintiff would usually be reluctant to file in the Federal court if he could file in an appropriate State court because of the unanimity feature which of course minimized or lessened the verdict since you were bound by the amount allowed by the most stingy juror, should I say.

I am also aware that the Federal courts for a long time have wished that they did not have to entertain diversity cases. Could the requirements of unanimity embedded in our statutes conceivably add another level to the threshold of how do we get into the Federal court and thereby keep out a few more cases? Was that a thought?

Judge Stanley. I do not recall that that was ever discussed.

Mr. Danielson. It might have been in the backroom discussions.

Judge STANLEY. Well, I have not heard it discussed, and I too, practiced in the days when I tried to stay out of the Federal court if I had a plaintiff's case. And that has changed considerably because of the Jury Selection Act. In those days, we had the blue-ribbon juries, if you recall, where the keymen submitted names and plaintiff's attorneys all complained that all they would see when they go into the courtroom was bankers and insurance men on the jury. That, of course, now, we have a cross section, a fair representation of the entire population which has changed that attitude a great deal.

Mr. DANIELSON. I was going to ask that. Really, it has had some effect then?

Judge STANLEY. Oh, yes. Definitely, and that is reflected I think by the growing backlog of civil cases.

Mr. DANIELSON. Do you find that a few diversity cases are now coming into the Federal court?

Judge STANLEY. Yes, quite a few.

Mr. DANIELSON. The removal proceedings situation is not as great as it used to be down there, defendants removing their case?

Judge STANLEY. It depends a lot on what your State is and what the State procedure is. Ours in Kansas, the procedure changed and Kansas adopted the Federal procedure and the lawyers sometimes would want the one or the other as they desired or did not desire discovery, and there are so many factors that enter into it.

Mr. DANIELSON. One remaining point only. On your comment with regard to a larger jury probably having greater minority representation, that is not, that is not a constitutional requirement in the selection of juries, I do not believe.

Judge STANLEY. No, it is not.

Mr. DANIELSON. Are you not concerned only with the aggregate of the panel from which the juror is selected?

Judge STANLEY. The Supreme Court has so far so held.

Mr. DANIELSON. Let us hope that the Constitution remains color-blind in the interest at least of evenhanded justice. Thank you very much for your presence.

Judge STANLEY. You are very welcome.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I want to thank both of you for your testimony and just say that this is one time that I am not going to equivocate. When I was trying cases, I did a lot of negligence work on both the plaintiff and the defense side, and I must say that I wished in Illinois that we had a rule where we had a six-man jury. And it seems to me that there is no question that it is going to expedite the proceedings. The fact that on your voir dire examination, and I think we had 5 preemptory challenges at the time and we spent literally hours picking a jury, and it is still my feeling that 6 people could do every bit as good a job as 12 people. And on the defense side, I would think that maybe you would have some defense lawyers that would feel that maybe it would give them a better shot at getting a hung jury, where in Illinois we have a unanimous verdict requirement which also I do not like.

Have there been expressions particularly from defense counsel that this is going to hurt their cause?

Judge STANLEY. When I mentioned that I had talked with some attorneys who initially opposed the six-man jury or wished that they had not adopted the rule, those were defense counsel. And I talked to them again, and they feel that well, it is fair.

Mr. RAILSBACK. It is fair.

Judge STANLEY. I think they would like to go back to 12, but they cannot think of a logical excuse or reason to support their belief.

Mr. DANIELSON. Would the gentleman yield? I think they would like 25.

Mr. RAILSBACK. Yes. I just am not sure that I agree with your admonition about the need for a unanimous verdict. Judge, in Minnesota, you are one of the pioneers in this, what kind of requirements do you have as far as the six-man jury is concerned?

Judge DEVITT. We have a straight six-man jury in all cases.

Mr. RAILSBACK. Do you have the unanimous verdict?

Judge DEVITT. Yes. It has always been true in the Federal system. But in the State systems, I would imagine there are 20 or more that have provisions for less than unanimous verdict.

As I was commenting to Congressman Danielson, in those States the lawyers are so accustomed to it that they will ask you in many cases in the Federal court to instruct the jury on the five-sixths verdict. I think it is largely what the lawyers are accustomed to. Those who have always had the unanimous verdict want to keep it that way, and the ones who have had less than a unanimous verdict want to keep it that way.

Mr. RAILSBACK. Under rule 48 of the Federal Rules of Civil Procedure, do you have any experience about what percentage of cases have been tried with less than 12 jurors by agreement?

Judge DEVITT. A relatively small number.

Mr. RAILSBACK. In other words, most of them try with the full 12-jury panel?

Judge DEVITT. In those districts other than the 63 which have adopted the six-man jury rule.

Mr. RAILSBACK. Where they have adopted that, have they adopted a rule that provides for a six-man jury or——

Judge DEVITT. Yes; yes, they have. One of the arguments made against the legitimacy of what we did was that we were violating rule 48 because by implication the only way to get less than 12 was to stipulate; and our view was that since the Supreme Court decision in 1970 that that was not true, and two circuit courts, the fifth and the ninth said that was true, and the Supreme Court of the United States said so. But that was the major challenge we had to our authority to adopt the six-man jury rule, that's rule 48.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. I want to thank both of you judges for coming, but I have some very severe difficulties. I have had experience with six-man juries in Massachusetts and I worked with the Massachusetts Bar Association and by statute we did in fact, authorize them. But, as I read the *Colgrove* case, what you people have done, I am afraid I agree with the dissent, that the Federal district judges have gone beyond the authority given to them. And let me quote the exact wording because it seems to me that you gentlemen have not really explained what power you have to do what you have done. And in the dissent it says this:

> All apparently agreed that the framers of Rule 48 presumed that there would be a jury of 12 in the absence of stipulation. The only authority which could

reduce 12 to 6 would be the authority that created Rule 48. Neither we, nor the District Court, nor the Judicial Conference or any Circuit Court Council had the authority to make that change.

And these four judges who concur in this say that only the Congress has the right to make the change that you people have now made in some 63 Federal districts, district courts. I know that you have recommended this change for 2, 3, or 4 years but I ask you candidly, have you found the Congress to be unresponsive to your recommendation? Why have you gone and done it on your own, and now have four members of the U.S. Supreme Court telling all of the Federal judges that they have stepped beyond their authority?

Judge DEVITT. Well, four members said we did and five said we did not. I will tell you why we did it on our own, because after we read the Supreme Court decision in *Williams* v. *Florida*, and that was in 1970, the Supreme Court placed its stamp of approval on the six-man jury provided for by the Florida constitution in a criminal case. Well, our reasoning was if the Supreme Courts says it is all right in a criminal case it must be all right in a civil case because that is much less serious.

Mr. DRINAN. Well, would it not have been better to come to the Congress and to get legislation which would have precluded all of this disharmony that comes about when the Supreme Court divides 5 to 4?

Judge DEVITT. Well, I have urged the Senate, at least Senator Burdick's subcommittee to do it long ago and it would have been better if that had been done but no action came. I am not disturbed that four members of the Supreme Court disagree with five. I suppose there are literally hundreds of decisions that come from the Supreme Court by five to four. It seems to me that our conduct has been approved by a vote of five to four. It would have been better if it was eight to one or nine to nothing.

Mr. DRINAN. It would have been better, judge, if it had been done by Congress and I may be the first one to say that maybe the Congress was negligent. And now you are asking us to patch it up, so to speak and to expend that power and authority.

Judge DEVITT. Not to expand it, but to equalize it, to make a uniform rule in the federal system. And that is what we need, a uniform rule.

Mr. DRINAN. Well, the Congress is locking the barn door after the horse has been stolen but, I am impressed by the large body of opinion that says that this is denying rather fundamental rights and that they are asking for empirical evidence, like Prof. Hans Zeisel, and many others are asking what evidence besides the convenience of Federal judges is offered that this is really shorter and quicker, and effective justice, the same effective justice. Suppose somebody wants nine members or eight members and they cannot have it, but the arbitrary rule you have made and now you glory in the fact that five to four has validated it but the power in my judgment was not there. Only the Congress has that power. But, what empirical evidence do you have to suggest that this is a better way of doing justice? I may grant you that it is quicker and it is easier. You only have 6 people rather than 12. But, I do not see really that you have made out any case that this is better justice.

Judge DEVITT. Well, what you are doing is rearguing the decision of the Supreme Court. All we are urging here is that you, to use your terminology, patch it up. We want it patched up in the interest of uniformity. If you favor uniformity, you favor this bill. That is the sum and substance, I think.

Mr. DRINAN. It is quite possible that Congress could go the other way.

Judge DEVITT. It might. And we will be governed by what they say, of course.

Mr. DRINAN. But you have not had that power up to now, have you, sir?

Judge DEVITT. I think we have. The Supreme Court said that we did and it is the final arbiter of what we do and do not do.

Mr. DRINAN. Maybe we, in the Congress, are at fault because we did not respond but you have really stated that you have this inherent power to do what now you are asking us to do.

Judge DEVITT. We said we assumed we had the inherent power, we acted on the assumption and the Supreme Court said we did have that power and all we are asking you to do now is to make the rule uniform. That is the sum and substance of it.

Mr. DRINAN. Well, do you think that reducing the preemptory challenges might also make it more impossible for a six-man jury to be broadly representative of minorities?

Judge DEVITT. Well, I think that three preemptory challenges on a side is just out of balance. I do not think it favors minorities or it is against minorities. It just means that it is possible for one side or the other to kick almost everybody off the jury. To have a total of six preemptory strikes on a jury of six is just out of balance. That is the sum and substance of it. Lawyers for defense and plaintiff both complain about that.

Mr. DRINAN. Well, do you expect this to be relitigated? Do you expect some gentleman like the gentleman from Montana who was very dissatisfied with the six-person jury, do you expect other petitioners to relitigate this?

Judge DEVITT. I do not think the man in Montana was disturbed. He was representing an insurance company and the insurance company's concern was that it wanted certainty in the law. This cloud was hanging over these Federal courts which had adopted the rule and that was a test case to say we had the authority or we did not have the authority. That is how it got to the Supreme Court and that is how it got to the fifth circuit.

Mr. DRINAN. Suppose somebody comes along and challenges your authority once again and this gentleman will say that Federal rule 48 provides that the parties may stipulate that the jury shall consist of any number less than 12 and then you make up the local rule, now adopted in 64 Federal districts, local rule 13 that says that you cannot have any number less than 12, you can have 6, period. The dissenter says that local rule 13 is totally inconsistent with Federal rule 48. Suppose somebody says that. What happens?

Judge DEVITT. I would cite the five men who are the majority in the *Colgrove* v. *Battin*. That is what I would do.

Mr. DRINAN. You want us to side with the five. If we pass this legislation we have to say that the five were correct and the four were wrong.

Judge DEVITT. I think what you have to do is accept the fact as it is, and that is that the Supreme Court says that we have the authority to do this. And whether you agree or you do not agree, the question for you it seems to me is whether you want uniformity in the Federal districts.

Mr. DRINAN. Yes; but we would have uniformity with the dissent.

Judge DEVITT. I suppose you could overrule the Supreme Court by enacting legislation providing we should have 12 member juries.

Mr. DRINAN. That's right.

Mr. RAILSBACK. Would you yield?

Mr. DRINAN. Yes.

Mr. RAILSBACK. Is this Battin that was the defendant, our colleague, Jim Battin, that also formerly sat on this Judiciary Committee?

Judge DEVITT. Yes; yes.

Mr. RAILSBACK. That is interesting.

Judge DEVITT. And I am proud to say that I was working with him quite closely in this case on the brief and he is a very fine man.

Mr. RAILSBACK. He was on this committee?

Mr. FUCHS. On this subcommittee.

Mr. RAILSBACK. On this subcommittee. That is interesting.

Mr. KASTENMEIER. Has the gentleman from Massachusetts concluded?

Mr. DRINAN. Yes; thank you very much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Smith.

Mr. SMITH. Thank you Mr. Chairman.

I want to thank both of you gentlemen for coming here and testifying. I guess my only comment is that it is probably a good thing that Father Drinan was not a member of that Supreme Court.

No questions.

Mr. DANIELSON. Mr. Chairman, may I make one observation, please? I think one of the things that harms the administration of justice so far as the trial of civil cases is concerned anyway, more than any one thing, is the belabored voir dire examination of juries. I would hope the judges in the Federal courts at least will take over more and more of that chore. I know that that has been a trend. I think it is an important trend.

Judge DEVITT. I think in 95 percent of the districts the judges do.

Mr. DANIELSON. I encourage you to keep moving in that direction.

Judge DEVITT. The State courts are moving that way too.

Mr. DANIELSON. The most important thing in the trial of law suits in addition to the good justice we have anyway and I have a lot of faith in the juries is to move them along and get people the relief they are entitled to.

Mr. KASTENMEIER. Judge Stanley——

Mr. SMITH. Mr. Chairman?

Mr. KASTENMEIER. The gentlemen from New York.

Mr. SMITH. Would you yield? I did have one question.

Judge Devitt, did I understand you to say that the attorneys involved in litigation also think that three preemptory challenges with a six-man jury are too many?

Judge DEVITT. All of them do on both sides.

Mr. SMITH. Both sides?

Judge DEVITT. Yes; everybody thinks that. Everybody thinks that I am sure.

Mr. SMITH. I thought I understood you to say that. Thank you.

Mr. KASTENMEIER. Judge Stanley, Judge Devitt, the committee thanks you both for your appearance this morning. And Judge Devitt, it is good to welcome you back to the Judiciary Committee after all of these years. Thank you both.

Judge STANLEY. Thank you, Mr. Chairman, gentlemen.

[Subsequent to the hearing, the Administrative Office of the United States Courts submitted the following:]

FEBRUARY 19, 1974.

Memorandum to: Mr. Carl Imlay, General Counsel, Administrative Office of the U.S. Courts.

From: Mr. James A. McCafferty, Assistant Chief, Division of Information Systems, Administrative Office of the U.S. Courts.

Subject: Analysis of Trial and Juror Usage Data for Fiscal Years 1972 and 1973.

Following your request and that of Judge Arthur J. Stanley, Chairman of the Committee on the Operation of the Jury System, we immediately began to assess the effect of the adoption of local district court rules which permit fewer than 12 members on a civil jury. Attached is a copy of this report together with the appendix describing the statistical experience of three groups of districts for each of fiscal years 1972 and 1973.

The success of this analysis is due almost entirely to the reinstitution, at the request of the Jury Operation Committee, of the JS–11 "Petit Jurors Used" form in the 94 district courts beginning in fiscal year 1971. It was this form from which all of the juror utilization figures were obtained. For data on completed trials, we used the JS–10 "Monthly Report of Trials" furnished by the judges holding trials in district courts and for the financial data, information was obtained from the Administrative Office budget statements prvoided by Mr. Edward Garabedian.

The approach taken in the study was to discover what facts are apparent without lengthy examination of the data. We found the research design of dividing the 94 districts into 3 groups (Group I districts seen as the "before and after" districts, Group II districts as the "always" districts and Group III districts as the "never" districts) to be the suggested way to approach this analysis. There is the matter of mixing small and large districts together as well as mixing those which may have a different composition of criminal and civil jury trials, but the broad brush figures tend to show that with all other efforts aimed toward improving jury utilization (which are general and genuine), those districts which have had a long-term or even a short-term experience with civil juries of less than 12 are improving their juror utilization index more dramatically. Further, these same districts have reduced their overall juror costs compared to districts which have not adopted the local rule.

The analysis was prepared under my direction. Principals in the preparation were Ms. Judy Mather in association with Mr. David Cook, Mr. Sam Moy and Mr. Thomas Wilson.

U.S. DISTRICT COURTS, ANALYSIS OF TRIAL DATA AND JURY USAGE, FISCAL YEARS 1972 AND 1973

Prepared by: Operations Branch, DIS, Administrative Office of the U.S. Courts, Washington, D.C.

INTRODUCTION

United States District Courts under provisions of Rule 48, Federal Rules of Civil Procedure, have always been able to permit fewer than 12 jurors in a civil trial. The first United States District Court to adopt a local rule providing for the reduction of the size of a civil jury was Minnesota which on November 12, 1970, stated that: "In all civil jury cases, the jury shall consist of 6 members."

In fiscal year 1971, 24 more districts joined with Minnesota with a similar rule for civil juries of less than 12 members. Another 27 joined the ranks of the

less than 12 civil jury rule in fiscal year 1972, with another 7 doing so during fiscal year 1973. The total at the close of fiscal year 1973 (June 30th) was 59, and since that date another 7 have promulgated similar rules governing the size of the civil jury bringing the total to 66 out of 94 district courts with reduced-size civil juries.

From an examination of the beginning dates for effectuation of the less than 12 member civil jury, it is possible to establish three groups of district courts as follows:

District Group I–17 districts all of which in late fiscal year 1972 or in early fiscal year 1973 adopted local rules providing for less than twelve persons to sit on a civil jury trial. This group can also be referred to as the "before and after" group since for most of the first year (F.Y. 1972) of the two-year period these districts provided for 12 persons to sit on their civil juries whereas in the second year (F.Y. 1973), the local rule provided for less than 12.

District Group II—41 districts which adopted reduced-size civil juries during fiscal year 1972 or earlier. Also referred to as the "always" group, since during the two-year period these districts had local rules providing for fewer than 12 jurors.

District Group III—36 districts which as of June 30, 1973 had not adopted reduced-size civil juries. This group, for the purposes of this analysis, is referred to as the "never" group.

For the analysis of the two-year experience in juror utilization, five summary tables are provided which highlight detailed data appearing in the appendix of this report. The appendix divides the districts into the three groups noted above.

The summary tables can be described as follows:

Figure A compares for both fiscal years 1972 and 1973 jury trials completed, both civil and criminal jury trial days, and cost per day for the three groups of districts.

Figure B highlights jury trials, jury trial days and costs, but further divides the three groups of districts into those which had a lower Juror Utilization Index [1] in 1973 than in 1972 and those which had JUI's which actually increased in 1973 over 1972.

Figure C focuses on the proportion of civil and criminal jury trials and jury trial days again for the three groups of districts further divided by the direction ther JUI took in 1973 over 1972.

Figures D and E provide illustrations of differences in juror utilization and cost "savings" for the three groups.

Three assumptions are to be examined in the analysis. These are:

1. Where juries of less than 12 have been adopted for civil jury trials the JUI's have decreased; that is, there have been fewer jurors called for service.

2. The average days of trial have not changed for civil cases in trial.

3. Overall costs have been reduced or there have been estimated savings.

ANALYSIS OF FIGURE A

Figure A shows that the three groups of districts shared the following findings:

1. Each had a higher number of completed jury trials (both civil and criminal combined) in 1973 than in 1972.

2. All three groups had proportionately more criminal trials in 1973 than in 1972. Group II leads with almost 64 criminal jury trials per 100 completed jury trials.

3. As would be expected, criminal jury trial days were proportionately greater in 1973 than in 1972 due to the impact of local Rule 50(b) [2] plans which call for a speedy trial.

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[1] Central to an understanding of the following analysis is the juror utilization index (JUI) which is a comparative average obtained by dividing the total number of petit jurors who annually come to the courthouse to serve by the number of annual jury trial days. Thus, a lower index evidences quantitative efficiency while a higher index evidences "inefficiency".

[2] After Rule 50(b) of the Federal Rules of Criminal Procedure became effective on October 1, 1972, each district court adopted a plan mandating the expedition and priority of criminal cases, and establishing time limits for the completion of each stage of the criminal proceeding.

FIGURE A

Comparisons of Trials Completed and Jury Trial Days Showing Cost Per Day of Jury Trial for Selected Groups of Districts with Emphasis on Size of Civil Jury Fiscal Years 1972-1973

		Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
			Total	Civil	Criminal	Total	Civil	Criminal		
GROUP I	TOTAL	Total for 17 districts which adopted court order reducing size of civil juries in fiscal year 1972 or early fiscal year 1973	1,280	630	650	2,928	1,474	1,454	20.55	$561
	1972		Percent of Total	49.2	50.8	Percent of Total	50.3	49.7		
	1973		1,397	634	763	3,380	1,511	1,869	18.98	$512
			Percent of Total	45.4	54.6	Percent of Total	44.7	55.3		Percent change -8.7
Group II Total		Total for 41 districts which adopted court order reducing size of civil jury in fiscal year 1972 or earlier	4,767	1,921	2,846	15,352	6,437	8,915	20.33	$479
	1972		Percent of Total	40.3	59.7	Percent of Total	41.9	58.1		
	1973		4,880	1,779	3,101	15,993	6,249	9,744	19.69	$475
			Percent of Total	36.5	63.5	Percent of Total	39.1	60.9		Percent change -.84
Group III Total		Total for 34 districts which had not adopted reduced size civil juries as of July 1, 1973	2,480	1,126	1,354	7,855	3,650	4,205	22.10	$558
	1972		Percent of Total	45.4	54.6	Percent of Total	46.5	53.5		
	1973		2,974	1,194	1,780	9,052	3,874	5,178	21.44	$533
			Percent of Total	40.1	59.9	Percent of Total	42.8	57.2		Percent change -4.5
Total 34 Districts			8,527	3,677	4,850	26,135	11,561	14,574	20.96	$512
	1972		Percent of Total	43.1	56.9	Percent of Total	44.2	55.8		
	1973		9,251	3,607	5,644	28,425	11,634	16,791	20.16	$498
			Percent of Total	39.0	61.0	Percent of Total	40.9	59.1		Percent change -2.7

Source: Administrative Office of the U. S. Courts
Division of Information Systems
Washington, D. C.

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4. All three groups of districts experienced lower Juror Utilization Indexes in 1973 than in 1972.

5. The cost per day of jury trial was less in 1973 than in 1972. Group I which in 1972 for the most part had no rules providing for less than 12 persons on a civil jury but in 1973 had such rules, recorded the greatest percentage decline in costs, 8.7%. Group II recorded the lowest cost per day of trial $479 in fiscal year 1972 and $475 in fiscal year 1973.

From the above, assumptions 1 and 3 are proven (assumption 2 is discussed in the analysis of Figures B and C, *supra.*).

1. For District Group I (before and after) and District Group II (always), the JUI's for both 1972 and 1973 were lower than for District Group III (never).

2. Costs for District Group I and II were lower for 1973 than that recorded for Group III districts. The District Group costs per day of jury trial for both years was as follows:

AVERAGE COST PER DAY OF JURY TRIAL

Fiscal year	District group I costs (before and after)		District group III costs (never)		District group II costs (always)
	Cost	Cost above group II	Cost	Cost above group II	
1972	$561	$82	$558	$79	$479
1573	512	37	533	58	475

The next part of this analysis will use both Figures B and C, and will demonstrate through the examination of each of the three groups of district courts that the assumptions made in the first part of his paper can be reinforced by a more in-depth study.

ANALYSIS OF FIGURES B AND C

District Group I—"Before and After":

This group of 17 districts had a juror utilization index of 20.55 in 1972 which dropped to 18.98 in 1973. As shown in Figure B, the 12 districts with a lower JUI in 1973 than 1972, decreased the number of jurors called in and/or available to serve on juries by over 1%. This decrease in the number called was accomplished even with a 27% increase in criminal jury trial days and a minimal increase of .5% in civil jury trial days. Of the three groups of districts, Group I had the lowest average of trial days per civil jury trial, 2.13 days in 1972 and 2.34 days in 1973.

With the holding down of the number of jurors called for service, the average cost per jury trial was $1,210 in 1973, or $30 less per jury trial than the $1,240 cost in 1972.

The 12 districts which experienced lower JUI's in 1973 than in 1972 spent $1,266,500 in 1972 and $1,243,400 in 1973, showing a reduction of $23,100 in overall costs.

FIGURE B

COMPARISON OF 3 GROUPS OF DISTRICTS SHOWING JURORS AVAILABLE, CIVIL AND CRIMINAL JURY TRIALS, AND COSTS FOR PETIT JURORS, FISCAL YEARS 1972 AND 1973

[Comparison based on juror utilization index down or up in 1973 over 1972]

Comparison	Group I—Reduced civil jury size adopted at or near the beginning of fiscal year 1973			Group II—Reduced civil jury size adopted prior to fiscal year 1973			Group III—Never adopted reduced civil jury size		
	Total	12 districts JUI down 1972–73	5 districts JUI up 1972–73	Total	22 districts JUI down 1972–73	19 districts JUI up 1972–73	Total	19 districts JUI down 1972–73	17 districts JUI up 1972–73
Total jurors available:									
Fiscal year 1972	60,146	45,934	14,212	312,107	174,960	137,147	175,172	115,394	59,778
Fiscal year 1973	64,140	45,403	18,737	314,971	162,259	152,712	194,039	132,132	61,907
Percent change	6.6	−1.2	31.8	.9	−7.3	11.3	10.8	14.5	3.6
Number of criminal jury trials:									
Fiscal year 1972	650	510	140	2,846	1,695	1,151	1,318	793	525
Fiscal year 1973	763	558	205	3,101	1,778	1,323	1,575	969	606
Percent change	17.4	9.4	46.4	9.0	4.9	14.9	19.5	22.2	15.4
Number of criminal jury trial days:									
Fiscal year 1972	1,454	1,087	367	8,915	4,950	3,965	4,246	2,861	1,385
Fiscal year 1973	1,869	1,381	488	9,744	5,085	4,659	5,178	3,708	1,470
Percent change	28.5	27.0	33.0	9.3	2.7	17.5	22.0	29.6	6.1
Average days per criminal trial:									
Fiscal year 1972	2.24	2.13	2.62	3.13	2.92	3.44	3.22	3.61	2.64
Fiscal year 1973	2.45	2.47	2.38	3.14	2.86	3.52	3.29	2.83	2.43
Percent change	9.4	16.0	−9.2	.3	−2.1	2.3	2.2	6.1	−8.0
Number of civil jury trials:									
Fiscal year 1972	630	515	115	1,921	955	966	1,128	671	457
Fiscal year 1973	634	472	162	1,779	967	812	1,154	692	462
Percent change	.6	−8.3	40.9	−7.4	1.3	−15.9	2.3	3.1	1.1
Number of civil jury trial days:									
Fiscal year 1972	1,474	1,099	375	6,437	2,898	3,539	3,650	2,039	1,611
Fiscal year 1973	1,511	1,104	407	6,249	3,187	3,062	3,874	2,518	1,356
Percent change	2.5	.5	8.5	−2.9	10.0	−13.5	6.1	23.5	−15.8
Average days per civil trial:									
Fiscal year 1972	2.34	2.13	3.26	3.35	3.03	3.66	3.24	3.04	3.53
Fiscal year 1973	2.38	2.34	2.51	3.51	3.30	3.77	3.36	3.64	2.94
Percent change	1.7	9.9	−23.0	4.8	8.9	3.0	3.7	19.7	−16.7
Total costs:									
Fiscal year 1972	$1,639,800	$1,266,500	$373,300	$7,349,900	$3,948,700	$3,401,200	$4,511,600	$2,863,500	$1,648,100
Fiscal year 1973	$1,732,300	$1,243,400	$488,900	$7,592,200	$3,640,900	$3,951,300	$4,828,000	$3,216,900	$1,611,100
Average cost:									
Per trial:									
Fiscal year 1972	$1,280	$1,240	$1,460	$1,540	$1,490	$1,610	$1,840	$1,960	$1,680
Fiscal year 1973	$1,240	$1,210	$1,330	$1,560	$1,330	$1,850	$1,770	$1,940	$1,510
Per trial day:									
Fiscal year 1972	$561	$580	$500	$479	$500	$450	$558	$580	$550
Fiscal year 1973	$512	$500	$550	$475	$440	$510	$533	$520	$570

Source: Division of Information Systems, Administrative Office of the U.S. Courts, Washington, D.C., February 1974.

FIGURE C

COMPARISON OF 3 GROUPS OF DISTRICTS SHOWING CRIMINAL AND CIVIL JURY TRIALS ON PERCENTAGE BASIS FISCAL YEARS 1972 AND 1973

[Comparison based on Juror Utilization Index Down and Up in 1973 over 1972]

Comparison	Group I—Reduced civil jury size adopted at or near the beginning of fiscal year 1973			Group II—Reduced civil jury size adopted prior to fiscal year 1973			Group III—Never adopted reduced civil jury size		
	Total	12 districts JUI down 1972–73	5 districts JUI up 1972–73	Total	22 districts JUI down 1972–73	19 districts JUI up 1972–73	Total	19 districts JUI up 1972–73	17 districts JUI up 1972–73
Total jury trials:									
Fiscal year 1972	1,280	1,025	255	4,767	2,650	2,117	2,446	1,464	982
Fiscal year 1973	1,397	1,030	367	4,880	2,745	2,135	2,729	1,661	1,068
Percent criminal trials:									
Fiscal year 1972	50.8	49.8	54.9	59.7	64.0	54.4	53.9	54.2	53.5
Fiscal year 1973	54.6	54.2	55.9	63.5	64.8	62.0	57.7	58.3	56.7
Percent civil trials:									
Fiscal year 1972	49.2	50.2	45.1	40.3	36.0	45.6	46.1	45.8	46.5
Fiscal year 1973	45.4	45.8	44.1	36.5	35.2	38.0	42.3	41.7	43.3
Total jury trial days:									
Fiscal year 1972	2,928	2,186	742	15,352	7,848	7,504	7,896	4,900	2,996
Fiscal year 1973	3,380	2,485	895	15,993	8,272	7,721	9,052	6,226	2,826
Percent criminal trial days:									
Fiscal year 1972	49.7	49.7	49.5	58.1	63.1	52.8	53.8	58.4	46.2
Fiscal year 1973	55.3	55.6	54.5	60.9	61.5	60.3	57.2	59.6	52.0
Percent civil trial days:									
Fiscal year 1972	50.3	50.3	50.5	41.9	36.9	47.2	46.2	41.6	53.8
Fiscal year 1973	44.7	44.4	45.5	39.1	38.5	39.7	42.8	40.4	48.0

Source: Division of Information Systems, Administrative Office of the U.S. Courts, Washington, D.C., February 1974.

These 12 districts actually passed on another "savings" since in 1973 they had not continued their 1972 juror call practices. (In 1973 fewer people were called for more jury trials.) Had they continued their rate or level of call in 1973 which they had in 1972, the overall costs to the taxpayer in 1973 for these 12 district jury operations would have been as much as $186,000 more for 1973.

For the 5 districts with increased JUI's in 1973 over 1972, there was a decided jump in criminal jury trials (up by 46.4%) and criminal jury trial days rose heavily by 33.0%. Civil jury trials also rose markedly by 40.9%, but days of civil jury trials rose only 8.5%.

Though for these 5 districts, costs for petit jury operation amounted to about one-third of the total costs realized by the other 12 districts, the cost per jury trial for the smaller group of districts was $220 higher per jury trial in 1972 and $120 higher in 1973 than the cost per jury trial in the other 12 districts.

District Group II—"Always" having less than 12 members on a civil jury during 1972 and 1973:

Among the 41 districts which adopted civil jury size of less than 12 members prior to fiscal year 1972 or in early F.Y. 1972, the juror utilization index averaged 20.33 in 1972 and 19.69 in 1973. For both years this was slightly less than the national JUI of 20.96 in 1972 and 20.16 in 1973. As previously indicated, these districts can for this analysis be refererd to as "always" having a local rule permitting less than 12 jurors for a civil trial.

A little more than half (22) of the districts in this group recorded lower JUI's in 1973 than 1972. The largest decline occurred in Puerto Rico which recorded a JUI of 28.28 in 1972 and 19.44 in 1973, a decrease of almost 9 jurors per trial day. This district was followed by the Eastern District of New York which recorded a drop of almost 7½ jurors.

Of the 20 districts with higher JUI's in 1973, Hawaii had an increase of 6⅓ jurors per trial day. Northern Indiana recorded an increase of 5½, with Eastern California showing a similar increase.

Not unlike the first group of 17 districts, these 41 districts were also affected by the number of criminal jury trials.

In those 22 districts with lower JUI's in 1973 compared to 1972, 14 experienced more criminal jury trials from 1 more in Minnesota to 48 more in Eastern New York. Overall, these 22 districts recorded 1,695 criminal jury trials in 1972 which increased by 83, or to 1,778 in 1973, an increase of 5%. For the civil jury trials the increase was from 955 to 967 in 1973, an increase of only 12 civil jury trials or 1.3%.

In the 19 districts with an increase in JUI (1973 over 1972), criminal jury trials increased by 172 or 15% whereas civil jury trials declined by 154 or 16% fewer. Stated another way, the number of criminal jury trials in 1972 represented 54.4% of the overall jury trials held in these 19 districts and by 1973 the proportion of criminal jury trials climbed to 62.0%.

In the 22 districts with improved JUI's in 1973 over 1972 the increase of 83 criminal jury trials can be compared to an increase of only 12 in civil jury trials. Stated another way, criminal jury trials accounted for 64.0% of all jury trials in 1972 and proportionately rose less than 1% or to 64.8% in 1973.

Again, comparing the 22 districts with lower JUI's in 1973 from the point of view of trial time, criminal jury trials took 2.9 average days in both 1972 and 1973 while civil jury trials rose from 3.0 average days in 1972 to 3.3 average days in 1973.

With an increase of 4.9% in criminal jury trials and 1.3% for civil jury trials, it is evident that these districts with lower JUI's have developed practices which reduce overcall of jurors for service. The $3,640,900 total cost of the jury operation in 1973 in these 22 districts was $307,800 less than a year ago. Though not all of the districts showed a decline, these districts averaged a decrease of $13,990 in 1973 over 1972.

This is a real savings as the result of better juror utilization. In addition to this, had the 22 districts continued the level of jury calls exercised in 1972 in 1973, the cost for petit jury administration would have been $4,137,600 in 1973. This figure compares to the actual 1973 cost of $3,640,900 and can be seen as an "estimated savings" of $496,700 for these 22 districts in 1973.

For the 19 districts with increased JUI's in 1973 compared to 1972 the cost figure rose to $3,951,300 in 1973, up by $550,100 over 1972. The rise appears associated with the increase in criminal jury trials which increased by 14.9% in 1973 over 1972. These trials required 12 jurors, plus one or two alternates whereas most of the civil trials which under local rule required less than 12 jurors declined by 15.9 percent in 1973.

Significantly, the 22 districts with lower JUI's in 1973 had more jury trials than the 19 with increased JUI's. In 1972 the 22 districts had 25.2% more jury trials and in 1973 they had 28.6% more.

But the decrease of $307,800 in costs for 22 districts with reduced JUI's in 1973 was overridden by the increase of $550,100 in the 19 districts with increases in JUI's resulting in an overall cost increase of $242,300. But when the cost per trial was calculated, this entire group of districts experienced a rise of only $20 per jury trial, from $1,540 in 1972 to $1,560 in 1973.

District Group III—Never adopted reduced civil jury size in fiscal year 1972 or 1973:

Emphasis on improved juror utilization in districts which had never adopted local rules permitting juries of less than twelve shows that 19 recorded lower JUI's in 1973 than 1972. Of these 19, 9 districts registered JUI's which fell below the national JUI of 20.16 in 1973. The 19 districts had JUI's which ranged from a low of 13.97 (Western Michigan) to a high of 27.23 (Southern New York).

Excluding Southern New York, Northern Georgia, Southern Texas, and Eastern Michigan districts, criminal trials in both years in these 15 districts ranged from a low of 9 to a high of 50. Again with the above exclusions, civil trials ranged rom a low of 1 (Alaska 1972) to a high of 91 (Middle Pennsylvania 1973).

In 1972 there were 793 criminal jury trials in these 19 districts compared to 969 in 1973. When compared to the Group II districts with lower JUI's, the number of civil jury trials in these 19 districts was low with 671 civil jury trials in 1972 compared to 955 in the 22 districts in Group II and 692 civil jury trials in 1973 compared to 967 again in the 22 districts of Group II. Compared another way, in 1973 the overall JUI for these 19 districts in Group III, which reduced their JUI in 1973, was 21.22. For the 22 districts in Group II with lower JUI's, their overall JUI was 19.62.

Because there was an overall increase in 1973 over 1972 in jury trials by 197 and an increase in jury trial days by 1,326, petit juror costs rose by $353,400. In a percentage comparison (1973 over 1972) jury trials went up 13.5%, jury trial days rose by 27.1%, and costs rose 12.3%.

The 17 districts with increased JUI's (1973 over 1972) accounted for about ⅓ fewer criminal jury and civil jury trials than those 19 districts with reduced JUI's. The 17 districts experienced an increase of 86 total jury trials with a decline of 170 jury trial days. Overall the costs dropped by $37,000 which can be attributed to the decline in trial days.

CONCLUSIONS

Earlier in this analysis three assumptions were put forth regarding the adoption of local district court rules which permit civil juries of less than 12 members. It appears from the foregoing that these assumptions have been sustained. Thus:

1. For the Group I districts in 1973, when the 17 districts followed the less than 12 member civil jury practice, the juror utilization index was lower than in 1972. For both 1972 and 1973 those 41 districts which for the most part of the two years had local rules permitting less than 12 member civil juries, the JUI was lower than for Group III which had never used less than 12 member juries by local court rule. (See Figure D.)

FIGURE D.—U.S. DISTRICT COURT JUI'S COMPARED: 1972 AND 1973

Districts	Overall JUI		Districts with increase in JUI		Districts with decrease in JUI	
	Number	JUI	Number	JUI	Number	JUI
Group I "before and after":						
1972	17	20.55	5	19.15	12	21.01
1973	17	18.98	5	20.94	12	18.27
Group II "always":						
1972	41	20.33	19	18.28	22	22.29
1973	41	19.69	19	19.78	22	19.62
Group III "never":						
1972	36	22.10	17	19.95	19	23.55
1973	36	21.44	17	21.91	19	21.22
Overall JUI's:						
1972	94	20.89	41	18.78	53	22.52
1973	94	20.16	41	20.39	53	20.01

2. Group I districts (before and after showed only a minimal increase in average days for a civil jury trial, from 2.34 days in 1972 to 2.38 days in 1973. The significance of the Group I districts' experience is that there was only a negligible increase in the average number of civil days per trial.

3. It is shown that where districts use civil juries of less than 12 (Group I in 1973 and Group II in both years) the average costs per trial, as well as costs per trial day, were well under those costs found in the 36 districts which had not adopted the local rule of less than 12 jurors for a civil trial.

Further, though all three groups improved their juror cost figures in 1973 over 1972, both group I and Group II districts passed on proportionately greater savings to the taxpayer than District Group III. Had both Group I aand Group II in 1973 called jurors in to serve at the same level as in 1972, the costs would have been greater, as shown in Figure E following.

Figure E—Estimated "Savings" if District Groups called at the 1972 level in 1973

	Estimated savings
District Group I (for 17 districts)	$143,500
District Group II (for 41 districts)	245,200
District Group III (for 36 districts)	149,400
Total all districts	561,000

With these assumptions sustained, juror utilization has improved since 1971 when a systematic jurors utilization reporting system was commenced. What has been analyzed is one factor affecting this improvement. Courts are also calling smaller voir dires as well as setting several trials in advance by using the multiple voir dire. Further, jury pooling, staggered trial starts, recycling jurors (returning to the jury room those not selected for a jury in a voir dire), establishment of settlement and plea deadlines and improved communication such as the "Code-a-phone" are each having a salutary affect on juror utilization. Somewhat offsetting these improvements is the nationwide increase in criminal jury trials which require 12 jurors, plus alternates where needed. The increase in the criminal trial calendar is due to the adoption of local rules in response to Rule 50(b), (F.R.Cr.P.).

The good practices of juror utilization, when joined with the adoption of local rules providing for civil juries of less than 12 members, has resulted in improved juror utilization, little or no change in average days of trial for civil jury cases, and reduced jury costs.

APPENDIX

UNITED STATES DISTRICT COURTS

TRIAL AND JUROR USAGE DATA FOR

FISCAL YEARS 1972 AND 1973

Prepared by: Administrative Office of the U.S. Courts
Division of Information Systems
Washington, D. C. 20544

GROUP I

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Alabama, Northern									
1972		223	198	25	418	360	58	15.87	$524
		Percent of Total	88.8	11.2	Percent of Total	86.1	13.9		
1973	7/1/72	167	139	28	364	276	88	13.45	$460
		Percent of Total	83.2	16.8	Percent of Total	75.8	24.2		Percent change -12.2
Alabama, Middle									
1972		72	30	42	148	70	78	18.46	$626
		Percent of Total	41.7	58.3	Percent of Total	47.3	52.7		
1973	8/15/72	90	32	58	160	60	100	18.54	$665
		Percent of Total	35.6	64.4	Percent of Total	37.5	62.5		Percent change +6.2
Connecticut									
1972		66	18	48	245	84	161	17.55	$434
		Percent of Total	27.3	72.7	Percent of Total	34.3	65.7		
1973	10/1/72	84	30	54	257	90	167	16.06	$376
		Percent of Total	35.7	64.3	Percent of Total	35.0	65.0		Percent change -13.4

*Arranged alphabetically

GROUP I

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Florida, Northern 1972	6/29/72	73	10	63	119	17	102	23.97	$573
		Percent of Total	13.7	86.3	Percent of Total	14.3	85.7		
1973		85	17	68	171	36	135	14.92	$353
		Percent of Total	20.0	80.0	Percent of Total	21.1	78.9		Percent change -38.4
Florida, Middle 1972		125	29	96	312	72	240	23.35	$760
		Percent of Total	23.2	76.8	Percent of Total	23.1	76.9		
1973	7/17/72	136	33	103	413	119	294	21.84	$577
		Percent of Total	24.3	75.7	Percent of Total	28.8	71.2		Percent change -24.1
Iowa, Southern 1972		33	10	23	98	30	68	20.33	$515
		Percent of Total	30.3	69.7	Percent of Total	30.6	69.4		
1973	7/28/72	53	19	34	183	71	112	15.88	$450
		Percent of Total	35.8	64.2	Percent of Total	38.8	61.2		Percent change -12.6

*Arranged alphabetically

GROUP I

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Kentucky, Western									
1972	5/1/72	68	38	30	112	68	44	25.38	$579
		Percent of Total	55.9	44.1	Percent of Total	60.7	39.3		
1973		69	31	38	171	59	112	20.88	$675
		Percent of Total	44.9	55.1	Percent of Total	34.5	65.5		Percent change +16.6
Louisiana, Middle									
1972	4/16/72	18	7	11	19	9	10	30.74	$716
		Percent of Total	38.9	61.1	Percent of Total	47.4	52.6		
1973		13	9	4	14	10	4	21.57	$664
		Percent of Total	69.2	30.8	Percent of Total	71.4	28.6		Percent change -7.3
Mississippi, Northern									
1972		54	31	23	98	59	39	26.79	$886
		Percent of Total	57.4	42.6	Percent of Total	60.2	39.8		
1973	1/1/73	52	18	34	131	47	84	21.70	$656
		Percent of Total	34.6	65.4	Percent of Total	35.9	64.1		Percent change -26.0

*Arranged alphabetically

GROUP I

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Missouri, Western									
1972		65	24	41	181	88	93	25.25	$588
		Percent of Total	36.9	63.1	Percent of Total	48.6	51.4		
1973	7/1/72	101	28	73	268	80	188	25.51	$601
		Percent of Total	27.7	72.3	Percent of Total	29.9	70.1		Percent change +2.2
Oklahoma, Eastern									
1972		30	13	17	58	36	22	26.66	$815
		Percent of Total	43.3	56.7	Percent of Total	62.1	37.9		
1973	7/1/72	32	13	19	54	29	25	19.61	$548
		Percent of Total	40.6	59.4	Percent of Total	53.7	46.3		Percent change -32.8
South Carolina									
1972		127	76	51	330	198	132	19.41	$573
		Percent of Total	59.8	40.2	Percent of Total	60.0	40.0		
1973	1/1/73	139	78	61	371	201	170	18.42	$588
		Percent of Total	56.1	43.9	Percent of Total	54.2	45.8		Percent change +2.6

*Arranged alphabetically

GROUP I

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Vermont									
1972		27	26	1	118	86	32	15.80	$386
		Percent of Total	96.3	3.7	Percent of Total	72.9	27.1		
1973	12/1/73	87	79	8	220	190	30	19.32	$472
		Percent of Total	90.8	9.2	Percent of Total	86.4	13.6		Percent change -22.3
Virginia, Eastern									
1972		179	73	106	311	127	184	25.44	$525
		Percent of Total	40.8	59.2	Percent of Total	40.8	59.2		
1973	7/1/72	185	78	107	303	136	167	21.95	$418
		Percent of Total	42.2	57.8	Percent of Total	44.9	55.1		Percent change -20.4
Washington, Eastern									
1972		23	15	8	71	44	27	15.17	$396
		Percent of Total	65.2	34.8	Percent of Total	62.0	38.0		
1973	7/1/72	18	3	15	51	7	44	19.78	$537
		Percent of Total	16.7	83.3	Percent of Total	13.7	86.3		Percent change +35.6

*Arranged alphabetically

GROUP I

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES AT OR NEAR THE BEGINNING OF FISCAL YEAR 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Jury Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Washington, Western									
1972		68	20	48	224	87	137	17.72	$450
		Percent of Total	29.4	70.6	Percent of Total	38.8	61.2		
1973	7/1/72	71	20	51	196	70	126	18.74	$460
		Percent of Total	28.2	71.8	Percent of Total	35.7	64.3		Percent change +2.2
Wyoming									
1972		29	12	17	66	39	27	14.50	$315
		Percent of Total	41.4	58.6	Percent of Total	59.1	40.9		
1973	9/1/72	15	7	8	53	30	23	12.19	$247
		Percent of Total	46.7	53.3	Percent of Total	56.6	43.4		Percent change -21.6
1972									
		Percent of Total			Percent of Total				
1973									
		Percent of Total			Percent of Total				Percent change

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Alabama, Southern									
1972	8/25/71	69	36	33	192	91	101	22.01	$698
		Percent of Total	52.2	47.8	Percent of Total	47.4	52.6		
1973		61	29	32	144	67	77	18.88	$658
		Percent of Total	47.5	52.5	Percent of Total	46.5	53.5		Percent change -5.7
Arizona									
1972	10/1/71	141	14	127	297	75	222	23.85	$581
		Percent of Total	9.9	90.1	Percent of Total	25.2	74.8		
1973		168	18	150	368	97	271	21.52	$505
		Percent of Total	10.7	89.3	Percent of Total	26.4	73.6		Percent change -13.1
California, Northern									
1972	12/6/71	130	30	100	581	205	376	18.78	$432
		Percent of Total	23.1	76.9	Percent of Total	35.3	64.7		
1973		109	31	78	613	271	342	18.07	$417
		Percent of Total	28.4	71.6	Percent of Total	44.2	55.8		Percent change -3.5

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
California, Eastern									
1972	11/5/71	43	16	27	207	77	130	15.27	$572
		Percent of Total	37.2	62.8	Percent of Total	37.2	62.8		
1973		52	8	44	228	45	183	20.79	$652
		Percent of Total	15.4	84.6	Percent of Total	19.7	80.3		Percent change +14.0
California, Central									
1972	3/15/71	229	29	200	865	147	718	19.15	$528
		Percent of Total	12.7	87.3	Percent of Total	17.0	83.0		
1973		248	41	207	1,061	179	882	20.44	$527
		Percent of Total	16.5	83.5	Percent of Total	16.9	83.1		Percent change -
California, Southern									
1972	4/15/71	143	7	136	365	21	344	26.98	$585
		Percent of Total	4.9	95.1	Percent of Total	5.8	94.2		
1973		135	7	128	316	53	263	27.24	$602
		Percent of Total	5.2	94.8	Percent of Total	16.8	83.2		Percent change +2.9

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Colorado									
1972	6/1/71	129	58	71	317	161	156	14.06	$359
		Percent of Total	45.0	55.0	Percent of Total	50.8	49.2		
1973		127	44	83	339	155	184	13.38	$314
		Percent of Total	34.6	65.4	Percent of Total	45.7	54.3		Percent change -12.5
District of Columbia									
1972	6/1/71	640	126	514	1,861	414	1,447	24.44	$364
		Percent of Total	19.7	80.3	Percent of Total	22.2	77.8		
1973		597	119	478	1,541	298	1,243	22.22	$282
		Percent of Total	19.9	80.1	Percent of Total	19.3	80.7		Percent change -22.5
Florida, Southern									
1972	3/1/71	192	52	140	515	159	356	25.20	$608
		Percent of Total	27.1	72.9	Percent of Total	30.9	69.1		
1973		219	50	169	640	194	446	20.82	$531
		Percent of Total	22.8	77.2	Percent of Total	30.3	69.7		Percent change -12.7

*Arranged alphabetically

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GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Hawaii									
1972	4/12/71	13	4	9	65	41	24	15.98	$315
		Percent of Total	30.8	69.2	Percent of Total	63.1	36.9		
1973		20	8	12	76	29	47	22.29	$501
		Percent of Total	40.0	60.0	Percent of Total	38.2	61.8		Percent change +59.0
Illinois, Northern									
1972	9/13/71	174	80	94	886	397	489	17.77	$407
		Percent of Total	46.0	54.0	Percent of Total	44.8	55.2		
1973		205	99	106	993	398	595	18.41	$501
		Percent of Total	48.3	51.7	Percent of Total	40.1	59.9		Percent change +23.1
Illinois, Eastern									
1972	9/1/71	44	21	23	108	48	60	19.39	$516
		Percent of Total	47.7	52.3	Percent of Total	44.4	55.6		
1973		56	16	40	122	36	86	22.22	$644
		Percent of Total	28.6	71.4	Percent of Total	29.5	70.5		Percent change +24.8

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year		Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
			Total	Civil	Criminal	Total	Civil	Criminal		
Illinois, Southern	1972	5/1/71	34	14	20	99	42	57	23.92	$610
			Percent of Total	41.2	58.8	Percent of Total	42.4	57.6		
	1973		33	14	19	79	36	43	25.08	$656
			Percent of Total	42.4	57.6	Percent of Total	45.6	54.4		Percent change +7.5
Indiana, Northern	1972	5/1/71	81	44	37	172	89	83	17.34	$424
			Percent of Total	54.3	45.7	Percent of Total	51.7	48.3		
	1973		77	25	52	165	48	117	22.89	$563
			Percent of Total	32.5	67.5	Percent of Total	29.1	70.9		Percent change +32.8
Indiana, Southern	1972	5/1/71	70	34	36	255	127	128	16.75	$523
			Percent of Total	48.6	51.4	Percent of Total	49.8	50.2		
	1973		75	37	38	250	143	107	15.18	$467
			Percent of Total	49.3	50.7	Percent of Total	57.2	42.8		Percent change -10.7

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Iowa, Northern									
1972	11/30/71	26	7	19	99	63	36	18.34	$460
		Percent of Total	26.9	73.1	Percent of Total	63.6	36.4		
1973		21	9	12	129	88	41	14.71	$406
		Percent of Total	42.9	57.1	Percent of Total	68.2	31.8		Percent change -11.7
Kansas									
1972	6/1/71	137	50	87	377	149	228	15.10	$383
		Percent of Total	36.5	63.5	Percent of Total	39.5	60.5		
1973		141	44	97	376	134	242	16.59	$423
		Percent of Total	31.2	68.8	Percent of Total	35.6	64.4		Percent change +10.4
Louisiana, Eastern									
1972	5/1/71	225	137	88	490	298	192	16.96	$466
		Percent of Total	60.9	39.1	Percent of Total	60.8	39.2		
1973		198	147	51	481	370	111	15.35	$380
		Percent of Total	74.2	25.8	Percent of Total	76.9	23.1		Percent change -18.5

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Louisiana, Western									
1972	4/15/71	70	40	30	198	86	112	23.19	$615
		Percent of Total	57.1	42.9	Percent of Total	43.4	56.6		
1973		61	34	27	159	95	64	24.40	$623
		Percent of Total	55.7	44.3	Percent of Total	59.7	40.3		Percent change +1.3
Maine									
1972	11/29/71	15	10	5	54	39	15	11.31	$341
		Percent of Total	66.7	33.3	Percent of Total	72.2	27.8		
1973		23	16	7	74	51	23	10.28	$288
		Percent of Total	69.6	30.4	Percent of Total	68.9	31.1		Percent change -15.5
Maryland									
1972	8/10/71	85	30	55	378	83	295	18.95	$443
		Percent of Total	35.3	64.7	Percent of Total	22.0	78.0		
1973		110	43	67	396	139	257	18.70	$435
		Percent of Total	39.1	60.9	Percent of Total	35.1	64.9		Percent change -1.8

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Massachusetts									
1972	11/1/71	145	54	91	603	241	362	16.23	$380
		Percent of Total	37.2	62.8	Percent of Total	40.0	60.0		
1973		108	18	90	384	75	309	18.06	$537
		Percent of Total	16.7	83.3	Percent of Total	19.5	80.5		Percent change +41.3
Minnesota									
1972	11/12/70	115	69	46	369	256	113	16.24	$407
		Percent of Total	60.0	40.0	Percent of Total	69.4	30.6		
1973		114	67	47	422	251	171	16.15	$387
		Percent of Total	58.8	41.2	Percent of Total	59.5	40.5		Percent change -4.9
Montana									
1972	7/14/71	37	16	21	91	48	43	17.88	$630
		Percent of Total	43.2	56.8	Percent of Total	52.8	47.2		
1973		35	14	21	112	38	74	18.52	$646
		Percent of Total	40.0	60.0	Percent of Total	33.9	66.1		Percent change +2.5

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Nebraska									
1972	3/1/72	57	35	22	204	134	70	19.65	$559
		Percent of Total	61.4	38.6	Percent of Total	65.7	34.3		
1973		69	36	33	215	123	92	17.93	$518
		Percent of Total	52.2	47.8	Percent of Total	57.2	42.8		Percent change -7.3
New Hampshire									
1972	9/1/71	26	15	11	72	43	29	17.03	$511
		Percent of Total	57.7	42.3	Percent of Total	59.7	40.3		
1973		23	14	9	87	51	36	13.87	$386
		Percent of Total	60.9	39.1	Percent of Total	58.6	41.4		Percent change -24.5
New Jersey									
1972	9/1/71	172	85	87	650	261	389	16.28	$356
		Percent of Total	49.4	50.6	Percent of Total	40.2	59.8		
1973		147	50	97	747	205	542	17.07	$420
		Percent of Total	34.0	66.0	Percent of Total	27.4	72.6		Percent change +18.0

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
New Mexico									
1972	5/1/71	66	25	41	136	71	65	19.29	$527
		Percent of Total	37.9	62.1	Percent of Total	52.2	47.8		
1973		65	20	45	139	51	88	20.14	$665
		Percent of Total	30.8	69.2	Percent of Total	36.7	63.3		Percent change +26.2
New York, Eastern									
1972	9/1/71	175	44	131	891	146	745	35.22	$816
		Percent of Total	25.1	74.9	Percent of Total	16.4	83.6		
1973		221	42	179	972	136	836	27.82	$660
		Percent of Total	19.0	81.0	Percent of Total	14.0	86.0		Percent change -19.1
North Carolina, Middle									
1972	1/1/72	36	8	28	62	10	52	19.39	$505
		Percent of Total	22.2	77.8	Percent of Total	16.1	83.9		
1973		35	5	30	78	13	65	18.18	$431
		Percent of Total	14.3	85.7	Percent of Total	16.7	83.3		Percent change -14.7

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Ohio, Northern									
1972	3/24/72	109	62	47	322	172	150	20.04	$483
		Percent of Total	56.9	43.1	Percent of Total	53.4	46.6		
1973		137	53	84	496	214	282	18.89	$467
		Percent of Total	38.7	61.3	Percent of Total	43.1	56.9		Percent change -3.3
Oregon									
1972	7/1/71	52	34	18	93	58	35	16.31	$467
		Percent of Total	65.4	34.6	Percent of Total	62.4	37.6		
1973		68	45	23	182	142	40	14.56	$337
		Percent of Total	66.2	33.8	Percent of Total	78.0	22.0		Percent change -27.8
Pennsylvania, Eastern									
1972	5/1/71	321	202	119	1,259	778	481	18.63	$448
		Percent of Total	62.9	37.1	Percent of Total	61.8	38.2		
1973		338	227	111	1,271	839	432	19.89	$486
		Percent of Total	67.2	32.8	Percent of Total	66.0	34.0		Percent change +8.5

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Pennsylvania, Western									
1972	9/1/71	195	158	37	880	715	165	18.04	$468
		Percent of Total	81.0	19.0	Percent of Total	81.2	18.8		
1973		185	105	80	892	562	330	20.74	$545
		Percent of Total	56.8	43.2	Percent of Total	63.0	37.0		Percent change +16.5
Puerto Rico									
1972	1/19/72	32	13	19	116	50	66	28.28	$1,087
		Percent of Total	40.6	59.4	Percent of Total	43.1	56.9		
1973		42	15	27	161	73	88	19.44	$692
		Percent of Total	35.7	64.3	Percent of Total	45.3	54.7		Percent change -36.3
Rhode Island									
1972	9/27/71	37	23	14	136	89	47	15.80	$345
		Percent of Total	62.2	37.8	Percent of Total	65.4	34.6		
1973		34	9	25	126	28	98	18.43	$398
		Percent of Total	26.5	73.5	Percent of Total	22.2	77.8		Percent change +15.4

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Tennessee, Eastern									
1972	10/13/71	160	79	81	276	131	145	17.88	$448
		Percent of Total	49.4	50.6	Percent of Total	47.5	52.5		
1973		160	99	61	268	178	90	16.43	$427
		Percent of Total	61.9	38.1	Percent of Total	66.4	33.6		Percent change -4.7
Tennessee, Middle									
1972	3/23/72	75	23	52	116	43	73	24.10	$624
		Percent of Total	30.7	69.3	Percent of Total	37.1	62.9		
1973		63	19	44	99	35	64	23.08	$555
		Percent of Total	30.2	69.8	Percent of Total	35.4	64.6		Percent change -11.1
Tennessee, Western									
1972	4/1/72	91	39	52	288	140	148	16.85	$395
		Percent of Total	42.9	57.1	Percent of Total	48.6	51.4		
1973		105	29	76	317	98	219	15.86	$383
		Percent of Total	27.6	72.4	Percent of Total	30.9	69.1		Percent change -3.0

*Arranged alphabetically

GROUP II

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH ADOPTED REDUCED SIZE CIVIL JURIES IN FISCAL YEAR 1972 OR EARLIER

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Texas, Western									
1972	7/1/71	157	88	69	328	187	141	17.78	$410
		Percent of Total	56.1	43.9	Percent of Total	57.0	43.0		
1973		169	63	106	373	166	207	17.89	$417
		Percent of Total	37.3	62.7	Percent of Total	44.5	55.5		Percent change +1.7
Wisconsin, Eastern									
1972	9/1/71	19	10	9	79	52	27	14.37	$374
		Percent of Total	52.6	47.4	Percent of Total	65.8	34.2		
1973		26	10	16	102	45	57	17.44	$408
		Percent of Total	38.5	61.5	Percent of Total	44.1	55.9		Percent change +9.1
1972									
		Percent of Total			Percent of Total				
1973									
		Percent of Total			Percent of Total				Percent change

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Alaska 1972		13	1	12	62	4	58	23.11	$855
		Percent of Total	7.7	92.3	Percent of Total	6.4	93.6		
1973		16	2	14	81	20	61	20.31	$630
		Percent of Total	12.5	87.5	Percent of Total	24.7	75.3		Percent change -26.3
Arkansas, Eastern 1972		73	46	27	152	90	62	19.99	$530
		Percent of Total	63.0	37.0	Percent of Total	59.2	40.8		
1973		65	37	28	169	95	74	19.69	$517
		Percent of Total	56.9	43.1	Percent of Total	56.2	43.8		Percent change -2.5
Arkansas, Western 1972		41	27	14	72	54	18	25.19	$723
		Percent of Total	65.9	34.1	Percent of Total	75.0	25.0		
1973		26	17	9	79	56	23	22.33	$644
		Percent of Total	65.4	34.6	Percent of Total	70.9	29.1		Percent change -10.9

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Canal Zone									
1972		5	-	5	6	-	6	25.33	$221
		Percent of Total	-	100.0	Percent of Total	-	100.0		
1973		7	-	7	9	-	9	29.11	$244
		Percent of Total	-	100.0	Percent of Total	-	100.0		Percent change +10.4
Delaware									
1972		23	9	14	43	23	20	28.12	$428
		Percent of Total	39.1	60.9	Percent of Total	53.5	46.5		
1973		37	14	23	87	36	51	22.22	$567
		Percent of Total	37.8	62.2	Percent of Total	41.4	58.6		Percent change +32.5
Georgia, Northern									
1972		209	96	113	480	238	242	20.55	$524
		Percent of Total	45.9	54.1	Percent of Total	49.6	50.4		
1973		337	80	257	667	273	394	19.94	$462
		Percent of Total	23.7	76.3	Percent of Total	40.9	59.1		Percent change -11.8

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Georgia, Middle									
1972		98	32	66	220	91	129	20.68	$456
		Percent of Total	32.7	67.3	Percent of Total	41.4	58.6		
1973		88	36	52	204	92	112	22.02	$503
		Percent of Total	40.9	59.1	Percent of Total	45.1	54.9		Percent change +10.3
Georgia, Southern									
1972		47	30	17	80	55	25	23.66	$601
		Percent of Total	63.8	36.2	Percent of Total	68.8	31.2		
1973		97	47	50	158	107	51	21.30	$543
		Percent of Total	48.5	51.5	Percent of Total	67.7	32.3		Percent change -9.7
Guam									
1972		19	9	10	41	22	19	26.22	$513
		Percent of Total	47.4	52.6	Percent of Total	53.7	46.3		
1973		23	14	9	48	28	20	25.46	$438
		Percent of Total	60.9	39.1	Percent of Total	58.3	41.7		Percent change -14.6

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year		Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
			Total	Civil	Criminal	Total	Civil	Criminal		
Idaho	1972		25	14	11	74	47	27	17.12	$502
			Percent of Total	56.0	44.0	Percent of Total	63.5	36.5		
	1973		16	5	11	52	17	35	20.65	$704
			Percent of Total	31.3	68.8	Percent of Total	32.7	67.3		Percent change +40.2
Kentucky, Eastern	1972		85	11	74	251	70	181	21.96	$588
			Percent of Total	12.9	87.1	Percent of Total	27.9	72.1		
	1973		135	10	125	277	16	261	27.43	$740
			Percent of Total	7.4	92.6	Percent of Total	5.8	94.2		Percent change +25.9
Michigan, Eastern	1972		184	87	97	987	482	505	16.97	$410
			Percent of Total	47.3	52.7	Percent of Total	48.8	51.2		
	1973		200	96	104	1,101	573	528	16.56	$399
			Percent of Total	48.0	52.0	Percent of Total	52.0	48.0		Percent change -2.7

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Michigan, Western									
1972		31	15	16	75	38	37	15.16	$546
		Percent of Total	48.4	51.6	Percent of Total	50.7	49.3		
1973		38	19	19	114	70	44	13.97	$444
		Percent of Total	50.0	50.0	Percent of Total	61.4	38.6		Percent change -18.7
Mississippi, Southern									
1972		44	35	9	139	120	19	27.05	$662
		Percent of Total	79.5	20.5	Percent of Total	86.3	13.7		
1973		48	29	19	126	92	34	30.63	$822
		Percent of Total	60.4	39.6	Percent of Total	73.0	27.0		Percent change +24.2
Missouri, Eastern									
1972		107	47	60	278	147	131	19.75	$456
		Percent of Total	43.9	56.1	Percent of Total	52.9	47.1		
1973		119	51	68	279	127	152	20.42	$489
		Percent of Total	42.9	57.1	Percent of Total	45.5	54.5		Percent change +7.2

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Nevada									
1972		40	11	29	82	21	61	23.62	$626
		Percent of Total	27.5	72.5	Percent of Total	25.6	74.4		
1973		51	6	45	149	20	129	21.87	$652
		Percent of Total	11.8	88.2	Percent of Total	13.4	86.6		Percent change +4.2
New York, Northern									
1972		37	15	22	113	66	47	23.12	$558
		Percent of Total	40.5	59.5	Percent of Total	58.4	41.6		
1973		45	18	27	132	43	89	20.80	$507
		Percent of Total	40.0	60.0	Percent of Total	32.6	67.4		Percent change -9.1
New York, Southern									
1972		340	113	227	1,509	286	1,223	31.69	$717
		Percent of Total	33.2	66.8	Percent of Total	19.0	81.0		
1973		448	146	302	1,967	453	1,514	27.23	$623
		Percent of Total	32.6	67.4	Percent of Total	23.0	77.0		Percent change -13.1

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
New York, Western									
1972		40	11	29	265	62	203	18.88	$462
		Percent of Total	27.5	72.5	Percent of Total	23.4	76.6		
1973		42	13	29	256	65	191	20.16	$529
		Percent of Total	31.0	69.0	Percent of Total	25.4	74.6		Percent change +14.5
North Carolina, Eastern									
1972		41	18	23	109	51	58	20.06	$500
		Percent of Total	43.9	56.1	Percent of Total	46.8	53.2		
1973		40	16	24	102	46	56	21.31	$613
		Percent of Total	40.0	60.0	Percent of Total	45.1	54.9		Percent change +22.6
North Carolina, Western									
1972		66	32	34	131	86	45	16.50	$397
		Percent of Total	48.5	51.5	Percent of Total	65.6	34.4		
1973		80	35	45	149	82	67	15.78	$368
		Percent of Total	43.8	56.3	Percent of Total	55.0	45.0		Percent change -7.3

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES
AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
North Dakota									
1972		14	3	11	51	12	39	20.57	$832
		Percent of Total	21.4	78.6	Percent of Total	23.5	76.5		
1973		31	11	20	115	45	70	18.87	$721
		Percent of Total	35.5	64.5	Percent of Total	39.1	60.9		Percent change -13.3
Ohio, Southern									
1972		77	46	31	220	136	84	18.50	$490
		Percent of Total	59.7	40.3	Percent of Total	61.8	38.2		
1973		82	53	29	231	169	62	19.22	$494
		Percent of Total	64.6	35.4	Percent of Total	73.2	26.8		Percent change +0.8
Oklahoma, Northern									
1972		43	22	21	91	54	37	20.31	$485
		Percent of Total	51.2	48.8	Percent of Total	59.3	40.7		
1973		35	14	21	77	33	44	21.05	$517
		Percent of Total	40.0	60.0	Percent of Total	42.9	57.1		Percent change +6.6

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Oklahoma, Western									
1972		79	25	54	175	70	105	18.29	$365
		Percent of Total	31.6	68.4	Percent of Total	40.0	60.0		
1973		65	28	37	137	67	70	21.66	$472
		Percent of Total	43.1	56.9	Percent of Total	48.9	51.1		Percent change +29.3
Pennsylvania, Middle									
1972		102	75	27	299	244	55	17.46	$683
		Percent of Total	73.5	26.5	Percent of Total	81.6	18.4		
1973		119	91	28	392	313	79	14.27	$376
		Percent of Total	76.5	23.5	Percent of Total	79.8	20.2		Percent change -44.9
South Dakota									
1972		40	13	27	114	59	55	24.66	$1,002
		Percent of Total	32.5	67.5	Percent of Total	51.8	48.2		
1973		39	16	23	109	59	50	26.70	$997
		Percent of Total	41.0	59.0	Percent of Total	54.1	45.9		Percent change -0.5

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and per-cent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Texas, Northern									
1972		143	90	53	526	393	133	17.64	$426
		Percent of Total	62.9	37.1	Percent of Total	74.7	25.3		
1973		150	94	56	480	298	182	18.34	$417
		Percent of Total	62.7	37.3	Percent of Total	62.1	37.9		Percent change -2.1
Texas, Eastern									
1972		83	61	22	311	234	77	15.43	$404
		Percent of Total	73.5	26.5	Percent of Total	75.2	24.8		
1973		83	62	21	306	223	83	15.65	$413
		Percent of Total	74.7	25.3	Percent of Total	72.9	27.1		Percent change +2.2
Texas, Southern									
1972		122	51	71	420	207	213	19.77	$468
		Percent of Total	41.8	58.2	Percent of Total	49.3	50.7		
1973		181	45	136	572	193	379	18.23	$429
		Percent of Total	24.9	75.1	Percent of Total	33.7	66.3		Percent change -8.3

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
Utah									
1972		31	13	18	47	30	17	21.11	$1,431
		Percent of Total	41.9	58.1	Percent of Total	63.8	36.2		
1973		61	25	36	57	31	26	24.42	$1,374
		Percent of Total	41.0	59.0	Percent of Total	54.4	45.6		Percent change -4.0
Virgin Islands									
1972		58	8	50	123	17	106	32.07	$771
		Percent of Total	13.8	86.2	Percent of Total	13.8	86.2		
1973		45	8	37	92	17	75	41.43	$790
		Percent of Total	17.8	82.2	Percent of Total	18.5	81.5		Percent change +2.5
Virginia, Western									
1972		24	15	9	48	33	15	18.40	$536
		Percent of Total	62.5	37.5	Percent of Total	68.8	31.2		
1973		32	23	9	61	38	23	17.31	$480
		Percent of Total	71.9	28.1	Percent of Total	62.3	37.7		Percent change -10.4

*Arranged alphabetically

GROUP III

TRIAL AND JUROR USAGE DATA FOR FISCAL YEARS 1972 AND 1973 FOR DISTRICTS WHICH HAD NOT ADOPTED REDUCED SIZE CIVIL JURIES AS OF JUNE 30, 1973

*District & fiscal year	Effective date of court order reducing size of civil jury	Trials Completed			Jury Trial Days			Jury usage index	Cost per day of jury trial and percent change
		Total	Civil	Criminal	Total	Civil	Criminal		
West Virginia, Northern									
1972		30	15	15	77	33	44	26.95	$748
		Percent of Total	50.0	50.0	Percent of Total	42.9	57.1		
1973		23	9	14	60	29	31	25.83	$813
		Percent of Total	39.1	60.9	Percent of Total	48.3	51.7		Percent change +8.7
West Virginia, Southern									
1972		49	21	28	137	45	92	26.04	$658
		Percent of Total	42.9	57.1	Percent of Total	32.8	67.2		
1973		57	22	35	125	44	81	24.32	$606
		Percent of Total	38.6	61.4	Percent of Total	35.2	64.8		Percent change -7.9
Wisconsin, Western									
1972		17	9	8	47	30	17	19.43	$514
		Percent of Total	52.9	47.1	Percent of Total	63.8	36.2		
1973		13	2	11	32	4	28	26.72	$681
		Percent of Total	15.4	84.6	Percent of Total	12.5	87.5		Percent change +32.5

*Arranged alphabetically

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Washington, D. C.

Judge DEVITT. Thank you, gentlemen.

Mr. KASTENMEIER. The Chair apologizes to the next witness for being so late in reaching him this morning but the Chair would like now to call on the Honorable Robert G. Dixon, Jr., who is Assistant Attorney General in the Office of Legal Counsel of the Department of Justice.

And the Chair personally recalls Mr. Dixon's contributions to the National Commission on Reform of the Federal Criminal Laws while he was yet a professor and before he entered into his present duties, and so personally it is very good to see you and welcome you again, Mr. Dixon.

TESTIMONY OF HON. ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY JAMES KELLEY, ESQ., OFFICE OF LEGAL COUNSEL

Mr. DIXON. Thank you, Mr. Chairman. I appreciate those kind remarks.

Mr. KASTENMEIER. And you may proceed as you wish. The committee has your 21-page statement, and you may either read from it or you may proceed in any manner you wish.

Mr. DIXON. Mr. Chairman, in view of the time factor I would suggest that I read from it selectively to give you the highlights perhaps and a basis for discussion.

Mr. KASTENMEIER. And without objection, your statement in its entirety will be accepted and placed in the record.

Mr. DIXON. I am pleased to have the opportunity to present the petition of the Department of Justice on two bills now before the subcommittee. One, S. 271, would eliminate the requirement for three-judge district courts in cases seeking to enjoin enforcement of State or Federal laws on constitutional grounds, except in reapportionment cases. The other, H.R. 8285, would provide for six-man juries in civil cases in the Federal district courts.

Both bills we feel would improve and expedite the administration of justice in the Federal court system. Particularly at a time when Federal caseloads at all levels are burgeoning, and no reversal of this trend is foreseeable, it is essential that the Congress review and revise outmoded, expensive, and time-consuming procedures contributing to court congestion and delay without advancing justice.

Both of these bills are responsive to this need. They have been endorsed, at least in concept, by the Judicial Conference of the United States, the Chief Justice, commentators, and practicing lawyers. The Department of Justice wholeheartedly supports prompt consideration and enactment of both H.R. 8285 and S. 271.

Let me turn now to the three-judge court bill. I will omit that part of my statement going into some past history and simply note that S. 271, recently passed by the Senate, would eliminate the three-judge court requirement in most cases by repealing sections 2281 and 2282 of title 28 of the United States Code. Although the bill would work a major change in Federal jurisdiction and procedure, unlike most changes in this area the need for it is scarcely disputed.

I will omit that part of my statement which summarizes material which is well known to you and gives various citations of support for the repeal of the three-judge court requirement, and turn over all the way to the exceptions from an outright universal repeal of the three-judge court requirement which are on page 7. I am wrong, they are on page 8, toward the bottom of page 8.

S. 271 would not eliminate all three-judge courts. Such courts would be retained for review in certain ICC cases (28 U.S.C. 2325); for antitrust cases brought under the Expediting Act (15 U.S.C. 29, 49 U.S.C. 45); and for certain civil rights cases; namely, those under 42 U.S.C. 1971(g), which is the Voting Rights Act; those under section 2000a–5(b) of title 42, which is in title II of the 1964 Civil Rights Act in regard to public accommodation matters; and those under title 42, section 2000e–b(b), which is again the 1964 Civil Rights Act, title VII regarding employment. We state in our statement here that further study might show that three-judge courts could be eliminated in all of these cases as well.

Now, let me amplify that in light of the discussion I heard earlier this morning about the questions you may have about our reasoning on repeal of these three additional provisions for three-judge courts. First, in regard to ICC cases, the Department of Justice is already on record as favoring shifting to a single judge. Testimony on that matter was given by Deputy Assistant Attorney General Bruce Wilson, on June 19, 1973, before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary. I have a copy of this testimony here. Excuse me, I misspoke. Mr. Wilson's testimony favored removing the three-judge review provision and substituting instead review by the court of appeals, not a single judge. But it was a position to move away from a three-judge requirement. That bill is S. 663.

Regarding the Expediting Act in antitrust matters, there, too, the Department of Justice would favor removal of the three-judge court requirement. We are supporting that position in S. 782.

I might add these statistics. Our records show that the three-judge court provision under the Expediting Act in antitrust matters has been used only seven times in the last 30 years, only once in the last decade.

Regarding the civil rights exceptions—the Voting Rights Act and title II of the 1964 act regarding public accommodations and title VII of the 1964 act regarding employment—we do not have a position. That was discussed, the matter was discussed this morning earlier with Judge Skelly Wright and Judges Stanley and Devitt in regard to the questions about statistics. We do have something to add on that. In regard to the use of three-judge courts in cases brought by the Department of Justice, these figures I have relate to the fiscal years 1971 and 1972. During these 2 fiscal years, the Department has not requested three-judge courts in any suits under title II or title VII of the Civil Rights Act of 1964, or the public accommodations and equal employment provisions of that legislation. In the same 2 fiscal years, we did not bring any suits requesting a three-judge court under section 1971(g) of title 42 relating to voting rights. I believe that the understanding of the chairman of the committee is correct as brought out in the dialog with Judge Wright that the figure of 183 cases, if I

recall correctly, in fiscal 1972, must have been composed primarily of private suits under sections 2281 and 2282 of title 28 United States Code.

Mr. DRINAN. Mr. Chairman, a clarification on that point.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Am I to understand under the proposal that some or all of these 183 would be rendered impossible?

Mr. DIXON. I believe that is correct, that if the bill were modified so as to remove in effect the exception of these three civil rights areas, three-judge courts could no longer be obtained by private plaintiffs in those cases.

Mr. DRINAN. Well, would you be able to speak on behalf of the Justice Department that many of these cases bring action, as you just mentioned, under the Voting Rights Act, and the accommodations and the employment and apparently the plaintiffs and their attorneys in 183 cases, and in an increasing number of cases over the past decade, have felt that this is a good remedy, they ask for it, they claim it. Why, therefore, should the Department of Justice wipe it out? They are helping to bring about the implementation of these laws.

Mr. DIXON. Let me correct a misunderstanding. I did not state that the Department of Justice at this time favored extending this legislation to the point of eliminating three-judge courts in civil rights cases.

Mr. DRINAN. Sir, it is my understanding that you did. You said that section 2281, under which 183 cases were brought last year, should be repealed. That is what you are recommending, and that if you had your way that the Department of Justice would say to 183 plaintiffs in civil rights cases, we do not want you to have the remedy that you have claimed.

Mr. DIXON. Let me clarify. I was talking about the three special civil rights statutes and——

Mr. DRINAN. Well, sir, I am just asking you for a reason now; and the enforcement of civil rights, I do not have to remind you, is a very difficult thing; and why should we say to 183 plaintiffs all over this country that we are wiping away the remedy that you have elected as the best possible way for you to assert your rights?

Mr. KASTENMEIER. May I?

Mr. DRINAN. Yes.

Mr. KASTENMEIER. Just to clarify the question, at least in the committee's mind, do you accept that that is the case, that 183 cases in fiscal year 1973 have been brought either under 2281 or 2282? I do not know which section.

Mr. DIXON. The only figures we have are those that relate to the Department of Justice action in the three special civil rights areas cited here in fiscal years 1971 and 1972. I should introduce perhaps my colleague.

Mr. KASTENMEIER. Yes.

Mr. DIXON. My attorney adviser, Mr. James Kelley, with the Office of Legal Counsel.

Mr. KELLEY. Thank you. I would surmise that the 183 has reference to fiscal 1973. I have the fiscal 1972 report.

Mr. KASTENMEIER. It does. No one said 1972 except I think Mr. Dixon.

Mr. KELLEY. I am getting to the bottom of this figure of 183. For 1972 and 1971, rather comparable figures are set forth in the report of the Administrative Office of the U.S. Courts and in those years there were 166 and 176. I gather that our figures have reference only to cases brought by us under the 1964 and 1965 acts.

Mr. KASTENMEIER. Therefore, you would conclude that it is 183 or whatever the figure is, 166 or 176, minus the cases that you brought?

Mr. KELLEY. Right.

Mr. KASTENMEIER. Must have been brought as private suits pursuant to 2281 and 2282?

Mr. KELLEY. Presumably the great majority of them were brought pursuant to 2281, relating to unconstitutional State statutes.

Mr. KASTENMEIER. Yes.

Mr. KELLEY. Just one other point. Father Drinan spoke of election of this remedy. I do not believe that plaintiffs have such an election. When you sue under present law to enjoin the enforcement of State statutes you must have a three-judge court. It is not a matter of choice. So, I do not think it reflects necessarily a preference for a three-judge court. They may well have such a preference, but I do not think that figure demonstrates it.

Mr. KASTENMEIER. So, the only question in issue is not whether they will have a remedy. They will have a remedy but whether the three-judge district court serves their purposes better than a single judge district court?

Mr. KELLEY. That is correct. And the fact that that statistic is high does not necessarily prove this premise.

Mr. KASTENMEIER. Right.

Mr. DRINAN. Mr. Chairman. I will ask them the further question that I see no affirmative evidence here whatsoever, that it is more convenient for the Federal courts, that it is better, that it is easier to have one than three, but the three were set forth by Congress with a lot of reasons, and that it was specified in all of the civil rights acts and that it has been used more and more and the burden is therefore, upon the Department of Justice to demonstrate that one judge is just as good as three to go against the intent of Congress. And I see no evidence whatsoever in Mr. Dixon's paper indicating that.

Mr. DIXON. Well, Dean Drinan, as I used to know you in the law school world, it is a policy matter for Congress to decide. There has been a general, growing trend of dissatisfaction with three-judge courts for a variety of reasons.

Mr. DRINAN. Who is dissatisfied? More and more plaintiffs are asking for them. They are not dissatisfied. They think this is the way.

Mr. DIXON. We have to balance objectives here. Historically there was felt to be a problem of prejudice on the part of a single judge who was sought by plaintiffs to enjoin operations of State regulatory statutes in the early days, and the three-judge court was thought to be beneficial to broaden the viewpoint and avoid casual invalidation of State law. We have gotten away from feelings that we used to have that a single judge would be either prejudiced or more parochial in his viewpoint than three judges. The problem has receded.

Mr. DRINAN. Well, who says that, sir? Well you could say that but who is the we who gets away from these feelings? I do not see that in the figures reflected here. I do not see that in the civil rights movement and I do not see my lawyers here saying that we just as soon have one. You are saying this for the Department of Justice and you do not even have it in your paper, or any statistics to have a belief that we have gotten away from the Federal judges biases and give us some evidence of that.

Mr. KASTENMEIER. Would you yield?

Mr. DRINAN. Yes.

Mr. KASTENMEIER. But Mr. Dixon, isn't it the case that really your position and that of the judges is silent in terms of policy. It has not really much to do with the policy as your associate, Mr. Kelley pointed out? It is not, we have learned, it is not whether the litigants have preferred the three-judge district court, but that that has been their sole recourse and the growing figure has nothing to do with whether it is popular? It is only in connection with pursuing that sort of litigation that it is popular. It is not the form which is limited as far as they are concerned as I understand it, and therefore, whether one forum is preferred to another, apparently the Department is silent on that. We have no evidence one way or the other and I think from our colloquoy with Judge Wright the committee has at least ascertained that it shall try to determine from such litigant organizations representing civil rights litigants whether they feel the three-judge district court is a preferred forum, would be preferred to a one-judge court. And at the present time it serves very little to debate the question until we can ascertain that it would seem to me because I do not think those who are testifying this morning are in a position to express that point of view. Therefore, I think we have reached on that issue a dead end for purposes of further colloquoy this morning, it would seem to me.

Mr. DIXON. I would agree, Mr. Chairman, that we won't know, absent much more massive, empirical evidence than is available, and given also the presumption that litigants even if there were a choice might prefer the three-judge court because of the extra advantage of immediate appeal to the Supreme Court. But the question becomes twofold. One, what do plaintiffs want, what would they like to have, and on the other hand, we have the public concern as to whether or not in terms of the total administration of justice system the three-judge court requirement is needed as a matter of justice in the civil rights area. That area was and still is dynamic but we have made great progress throughout the country and including the South where I believe many of these cases are centered in the last several years.

If there is a general feeling that three-judge courts are inappropriate for the great mass of litigation now, it would seem that unless there was some very special reason to exempt civil rights cases from that general feeling they might as well be included in the general move away from three-judge courts, for all of the reasons given which includes public benefits as well as the impact on private interest.

Mr. KASTENMEIER. I yield to the gentleman from Illinois for a question.

Mr. RAILSBACK. I have one quick question.

Am I correct that that there are still two areas of civil rights cases where there are three-judge courts still provided and if so I am wondering if perhaps some of the 183 cases that we referred to which were brought under the other, the injunctive relief sections of the code if perhaps relief might not have been available under either the Civil Rights Act of 1964 or the Voting Rights Act of 1965?

Mr. Dixon. Let me try to restate that. S. 271 would repeal 2282 of title 28 and would amend and substantially repeal 2284. It makes no mention of two sections in the 1964 Civil Rights Act, or the 1965 Voting Rights Act which I alluded to, or of the public accommodations and the employment section of titles IV and VII and of the 1964 Civil Rights Act, and also S. 271 makes no mention of the 1965 Voting Rights Act.

Mr. Railsback. Do those sections you just mentioned deal with injunctive relief or could injunctive relief be sought under those acts?

Mr. Dixon. There can be injunctive relief under all of those statutes.

Mr. Railsback. So, possibly of the 183 cases, some of those cases which were apparently brought under the sections that we are being asked to repeal could have been brought under the 1964 or 1965 civil rights law.

Mr. Dixon. Well, that would have been the case perhaps in earlier years. But, our figures show that we have not utilized three-judge courts, under those three special sections I alluded to, in fiscal years 1971 and 1972.

Mr. Railsback. I see.

Mr. Kelley. One other point. The three-judge court is convened at the request of the Attorney General in those cases. I do not believe the private plaintiff under title VII can ask for a three-judge court.

Mr. Dixon. The private plaintiff can ask the Attorney General to intervene and ask for a three-judge court.

Mr. Kastenmeier. May I ask the witness to continue because the hour is late and I do want him to cover as well as he can under the circumstances all of the ground and then if we have time we can return to matters we have been engaging in colloquy about.

Mr. Dixon. Certainly.

On page 9 I have a special word about reapportionment cases. S. 271 would exempt from the repeal of the injunction section of title 28 cases concerning the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. We favor retention of that. Well, let me rephrase it. We favor that provision in S. 271 at least for the time being. My statement mentions that this is an esoteric area, and in all candor I should state that I have been very active in the reapportionment field over the years in writing, teaching and in litigation.

The Supreme Court recently in a major series of rulings including one, *Gaffney* v. *Cummings* of last June, which I argued, has modified considerably the rules of the game concerning State legislative reapportionment. It has eased somewhat the stringency of the absolute equality concept which lower courts were applying, and it has also indicated that recognition of political realities would not be wholly inappropriate if done for the purpose of improving the fairness of a plan rather than feathering the nest for one party. This is a new ruling.

Now, prior to 1973 it was rather easy for a plaintiff to prevail. He could frequently, late in the day, and on the eve of an election, introduce a plan which was only fractionally more equal than the plan prepared by the official State processes. If the court adopted that plan, as it frequently did, you would see that plan used in the next election unless the district court orders were stayed. The legislature thus elected under the plaintiffs' plan could reapportion the State on a permanent basis for the future once they were sitting. We feel, and summarize on page 10 and 11 in more detail, that at least for the time being in the United States up through the 1980 census, which is our next big bulge in reapportionment cases, that the three-judge district court requirement would be beneficial.

As I say at the bottom of page 11, the crux of the matter in short is that in most reapportionment litigation an election is imminent and correction of a possibly erroneous district court ruling, if not made prior to the election, is impossible because the matter is mooted by the election.

There will be relatively few, I believe, reapportionment cases in the next 3 years despite a big bulge this last year. But that was sort of explained by the nature of the beast and the decennial reapportionment process. The burden will not be too great and we feel the benefit makes it very much worth while to retain the three-judge court for the time being in that area of reapportionment.

I may now turn if you wish to the six-man juries in civil cases.

Mr. KASTENMEIER. Before you do if I may interrupt you Mr. Dixon, I would like to inquire of my colleagues. Would you be agreeable to reconvening in 15 minutes after completion of the pending quorum call? My understanding is that Mr. Campbell will not be very long in his presentation so we can accommodate both the bar association and Mr. Dixon and not require them to come back another day, if that is agreeable?

Mr. RAILSBACK. Mr. Chairman, I think Counsel just pointed out something that we should consider and that is how much time is left in general debate?

Mr. KASTENMEIER. We explored that; 20 minutes.

Mr. RAILSBACK. Twenty minutes. And then it becomes illegal for us to sit.

Mr. KASTENMEIER. Then it becomes illegal for us to sit. So we have a time factor. However, it is not as though it is a markup or something.

Mr. RAILSBACK. No, no. I agree.

Mr. KASTENMEIER. With that in mind and with your indulgence, both Mr. Dixon and Mr. Campbell, we will recess for 15 minutes and reconvene.

[Short recess.]

Mr. KASTENMEIER. The committee will come to order to resume its hearings on H.R. 8285 and S. 271. The Assistant Attorney General, Hon. Robert G. Dixon, Jr., Office of Legal Counsel, was testifying. And, Mr. Dixon, you may continue. You were about to discuss six-man juries in civil cases.

Mr. DIXON. Thank you, Mr. Chairman. And I will pick up on page 12 of my prepared statement and make a few remarks selectively and not repeat matters from this morning's discussion if I can.

We all know that juries in Federal court proceedings have been composed of 12 persons from our beginning as a Nation. That applies both to criminal and civil proceedings. However, in the *Colgrove* v. *Battin* case of last June the Court sustained a local rule of the U.S. District Court for the District of Montana providing for six-man juries in the trial of civil cases against contentions that the rule violated the seventh amendment preservation of jury trial rights "in suits at common law." This decision, as mentioned this morning, was a five-to-four decision. The four who did not join with the majority themselves split. Only two reached the constitutional issue. Two went off on the nonconstitutional ground of the proper construction of rule 48 of the Federal Rules of Civil Procedure as already mentioned.

Taking that case as the foundation stone it would appear that constitutional objections to a Federal policy of six-man juries had been laid to rest. In terms of the policy issues, we mention again on page 14 several advantages culled in part from the literature which would result in reduction of Federal civil juries from 12 to 6. They include economy, expedition of trials, lessening of the burden of jury service and I will not give the details on those. They are in my statement.

One point might be worth special mention regarding the effect, of going from 12 down to six, on the juries' representative character in terms of bringing all viewpoints in the community to bear in the trial process. It probably is true that six man juries will not be as representative in communities that are highly stratified or ethnically or racially diverse.

However, a jury, after all, is not intended, is not supposed to be a political organ. That is not the intent and the Supreme Court has long held that members of minority groups are not constitutionally entitled to representation in particular juries in proportion to their numbers. On that we cite *Swain* v. *Alabama*, 380 U.S. 202 back in 1965.

It also has been argued that 6-man juries will produce results different from those produced by 12-man juries. Professor Zeisel of Chicago has spoken to that point in an article we cite in our full statement. Now, this does seem to be rather speculative. I did read his article, and it is more an abstract exercise in logic than in empirical research based on the experiences in those States which have had an experienced record on six-man juries. It was interesting but I do not feel it was dispositive.

Also, the Supreme Court recognized in the *Battin* case itself that other more recent studies, and I quote the Court, "have provided convincing, empirical evidence of the correctness of the conclusion that there is no discernible difference between the results reached by the two different sized juries." So we conclude that the weight of the evidence now available supports rather strongly the commonsense conclusion that on the average, 6 men will arrive at about the same verdict in a case, such as a damages case, as would 12.

And half of the Federal district courts, and the Superior Court for the District of Columbia, are now using six-man juries in some or all civil cases.

Last, on page 21 of my statement, we would like to suggest two possibly helpful clarifying changes. First, the wording in the proposed

section 1875 might be read as expanding jury trial rights beyond those classes of cases in which juries are presently provided by virtue of the seventh amendment or by particular Federal statute. We recommend that the wording be clarified to show that no such expansion is intended. Second and also part of the first point really, the phrase "civil case at law" in section 1875 suggests that the six-man limit might not be applicable to advisory juries impanelled in equity cases. The bill should make it clear that the six-man limit applies in all noncriminal jury cases. And I did bring along some suggested language which I can submit for the committee's consideration to accomplish that objective.

Mr. KASTENMEIER. We would be pleased to receive the proposed language you have. It will be received for the record and by counsel for the committee.

[The proposed language follows:]

DEPARTMENT OF JUSTICE PROPOSED AMENDMENTS TO PROPOSED SECTION 1875 OF TITLE 28. (DELETIONS IN BLACK BRACKETS AND ADDITIONS IN ITALIC.)

§ 1875 Number of jurors in civil cases.

In a district court of the United States as defined in section 1869 (f) of this title, the petit jury in a civil case [at law, or in a non-criminal action in which a right to trial by jury is otherwise granted by statute] shall consist of six jurors, unless the parties stipulate to a lesser number. *Nothing in this section shall be construed to grant a right to trial by jury in any case in which such right is not granted by the Seventh Amendment to the Constitution of the United States or by another statute.*

Mr. DIXON. In concluding, let me stress the Department's conviction that these are important bills warranting swift enactment. Although the Federal judicial system has been improved substantially in recent years, this critically important and complex system is still under great stress. H.R. 8285 and S. 271 would contribute substantially to the alleviation of that stress and to the speedier and fairer administration of justice.

We should be slow to jettison the past but quick to learn from experience. Thank you.

[The full statement of Mr. Dixon follows:]

STATEMENT OF ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL ON S. 271, RELATING TO THREE-JUDGE COURTS; AND H.R. 8285, RELATING TO SIX-MAN JURIES IN CIVIL CASES

Mr. Chairman and members of the subcommittee, I am pleased to have the opportunity to present the position of the Department of Justice on two bills now before the subcommittee. One, S. 271, would eliminate the requirement for three-judge district courts in cases seeking to enjoin enforcement of State or federal laws on constitutional grounds, except in reapportionment cases. The other, H.R. 8285, would provide for six-man juries in civil cases in the federal district courts.

Both bills we feel would improve and expedite the administration of justice in the federal court system. Particularly at a time when federal caseloads at all levels are burgeoning, and no reversal of this trend is foreseeable, it is essential that the Congress review and revise outmoded, expensive and time-consuming procedures contributing to court congestion and delay without advancing justice.

Both of these bills are responsive to this need. They have been endorsed, at least in concept, by the Judicial Conference of the United States, the Chief Justice, commentators and practicing lawyers. The Department of Justice wholeheartedly supports prompt consideration and enactment of both H.R. 8285 and S. 271.

S. 271—THREE-JUDGE DISTRICT COURTS

Throughout our history, the jurisdiction and powers of the federal courts have generated periodic and heated controversies. The three-judge court provisions of the Judiciary Act of 1911 (36 Stat. 1162), of which present sections 2281 and 2282 of the Judicial Code are direct descendants, was enacted largely in response to the Supreme Court's 1908 decision in *Ex Parte Young*, 209 U.S. 123, holding that State officials could be enjoined by the federal district courts from enforcing unconstitutional State statutes. The Young decision came down at a time of rapid business expansion and of efforts by the States to regulate and control that expansion. Many district judges, responding sympathetically to arguments couched in terms of "inviolable property rights" and "substantive due process" issued injunctions against State regulatory programs, frequently on the basis of affidavits alone, and sometimes without a hearing.

The original Three-Judge Court Act was designed to prevent improvident issuance of injunctions against State regulatory programs by requiring that such cases be heard by a district court of three judges. The Act also provided for direct appeal to the Supreme Court in order to expedite final resolution of these disputes concerning State public policy.

Thereafter, the Act underwent several revisions, and, in 1937, it was extended to cover cases seeking injunctions against federal statutes. Present sections 2281 and 2282 of the Judicial Code require that a three-judge district court be convened in cases seeking injunctive relief against a State or federal statute on the ground of unconstitutionality, and appeals lie directly to the Supreme Court.

S. 271, recently passed by the Senate, would eliminate the three-judge court requirement in these cases by repealing sections 2281 and 2282. Although the bill would work a major change in federal jurisdiction and procedure, unlike most changes in this area, the need for it is scarcely disputed.

Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, pp. 316–326; Statements of Professor Wright and Judges Friendly and Wright in *Hearings supra* at 753, 769 and 787. The Judicial Conference of the United States has approved a bill substantially similar to S. 271. The Chief Justice had this to say in his "Report on Problems of the Judiciary" to the American Bar Association last year—

> "We should totally eliminate the three-judge district courts that now disrupt district and circuit judges' work. Direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one of five cases heard by the Supreme Court. The original reasons for establishing these special courts, whatever their validity at the time, no longer exist. There are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it. Remarks of Warren E. Burger, Chief Justice of the United States, before American Bar Association, San Francisco, Calif., August 14, 1972."

The entire matter is ably discussed in the Senate Committee report on S. 271. See S. Rep. No. 93–206 on S. 271, 93d Cong. 1st Sess. Accordingly, I will discuss only briefly the major considerations supporting enactment of S. 271.

Three-judge district courts involve extremely wasteful use of scarce judicial manpower. Three judges are required to do the work of one, and one of the three must be a circuit judge. The logistical problems are not so great in, say, the Southern District of New York, where the judges for that district and the Second Circuit work in the same building on Foley Square in New York City. But things are not so simple in Texas or Montana. In those areas, two of the three judges may have to travel hundreds of miles to sit together to hear a witness testify. In protracted cases, several trips may be necessary.

Such wastage of judicial manpower was relatively less serious a decade ago. In the 15-year period between 1947 and 1961, there were less than 100 three-judge court hearings each year. Since that time, however, the number of three-judge court hearings has grown from over 100 each year to over 300 each year. Much of this increase has been attributable to civil rights and reapportionment cases. See 1972, *Annual Report of the Director*, Administrative Office of United States Courts, II–91.

While the thrust of present sections 2281 and 2282 is clear enough, their language is ambiguous in several respects. Because the federal judiciary has long

viewed the three-judge court requirement as wasteful, it is hardly surprising that statutory ambiguities in language would be strictly construed. See *Phillips* v. *United States*, 312 U.S. 246 (1941). While a hostile judicial approach to the three-judge court requirement has undoubtedly narrowed its scope to some extent, this approach has also resulted in an arcane case law as to when three judges are required. In his landmark study of the subject, Professor Currie quite appropriately referred to the passage from Macbeth—"When shall we three meet again, in thunder, lightning or in rain?" As Professor Currie demonstrates, the question is often not easily answered. The result has been a heavy volume of wasteful litigation over jurisdictional issues, largely negating any benefits derived from narrow constructions of the statute.

As I mentioned earlier, in cases covered by the three-judge court requirements of sections 2281 and 2282, an appeal as of right lies directly to the Supreme Court. This bypassing of the courts of appeals, the Chief Justice's words bear repeating, "has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one of five cases heard by the Supreme Court." By making these cases subject to the usual appellate process, many of them would be winnowed out at the court of appeals level, by clearly correct resolution of the issues at that level, or by denials of certiorari at the Supreme Court level in relatively unimportant cases. At a time when serious consideration is being given to creation of a "mini Supreme Court" to alleviate congestion on the docket of our highest court—a highly controversial proposal—we should, at the very least, eliminate one serious cause of that congestion in a way in which virtually all serious students of the question can agree.

Changes in the law and judicial attitudes towards injunctive relief against State officials have gone far to erode the original justifications for the rule. For one thing, the Federal Rules of Civil Procedure have imposed strict limits on the issuance of *ex parte* temporary restraining orders. See Rule 65(b), Fed. R. Civ. Proc. Recent decisions of the Supreme Court manifest a high degree of sensitivity to the need for comity and due deference to State processes in our federal system. See, *e.g.*, *Younger* v. *Harris* 401 U.S. 37 (1971) ; *Askew* v. *Hargrave*, 401 U.S. 476 (1971). If injunction-minded single district judges do not exercise their discretion to grant stays pending appeal, the courts of appeals and Circuit Justices may entertain applications for stays.

S. 271 would not eliminate all three-judge courts. Such courts would be retained for review in certain ICC cases (28 U.S.C. 2325), anti-trust cases brought under the Expediting Act (15 U.S.C. 29, 49 U.S.C. 45), and certain civil rights cases (42 U.S.C. 1971 g, 2000a-5(b) and 2000e-6(b)).

Further study might show that three-judge courts could be eliminated in all of these cases as well. However, repeal of sections 2281 and 2282 would eliminate the bulk of the present problem, because most three-judge court cases arise under them.

A special word is warranted concerning the provision of S. 271 which would retain the three-judge court requriement in reapportionment cases. This is an esoteric area well-known to only a few, but in all candor I must say that it has been one of my specialties and I have some considered views on it. One area where three-judge district courts have a high claim to be retained, at least through the 1980 census litigation, is the reapportionment area. This is so because the structure of the key state policy-making body is at stake—the legislature—and the record of the district courts in this area has been unsettling.

In a single-minded pursuit of the notion that voters are fungible, too many district courts have been willing to allow any plaintiff on the eve of an election not only to unhorse a carefully constructed official state plan, by showing that his plan is a few bodies better in equality, but to impose that plan on the state for the next election. (The judicially imposed plaintiff plan normally is a radically different plan politically from the official plan, but that fact, the key fact, is totally concealed.)

Only the provision for prompt Supreme Court review, and the resultant stays pending appeal, have avoided use of dubious plaintiff plans in several states in the recent past, *e.g.*, Indiana 1970, *Whiteomb* v. *Chavis*, 396 U.S. 1064 (1970: Texas 1972, *White* v. *Weiser*, 41 U.S. Law Week 4900 (1973) ; Connecticut 1972, *Gaffney* v. *Cummings*, 41 U.S. Law Week 4981 (1973).

Retaining the three-judge court for reapportionment should not be unduly burdensome because reapportionment litigation can be expected to develop in

decennial clusters. For example, although there was a total of only 17 cases in the 4-year period prior to 1972, there were 32 cases in 1972 constituting approximately 10% of the total number of three-judge cases in that year. 1972 Report, Administrative Office of United States Courts, p. II–91. A sharp decline can be expected in the last half of this decade.

The Supreme Court issued several significant reapportionment decisions in the 1972 Term, including the landmark decision in *Gaffney* v. *Cummings*, 41 U.S. Law Week 4981 (1973) (I call it a landmark decision partly because of its intrinsic importance and partly because I argued the cause successfully). The *Gaffney* ruling allows minor deviations in mathematical equlity among state legislative districts, and indicates that lines drawn by a poltically-aware bipartisan board in pursuit of political fairness are not *per se* suspect; proof of invidious discrimination is needed to challenge them.

The *Gaffney* ruling, and other rulings in the 1972 Term, should have the long-run effect of insulating substantially equal reapportionment plans from close judicial scruntiny. However, in the short run continued Supreme Court vigilance may be needed because the past district court record offers no assurance that there will be compliance with th new 1973 rulings without expedited Supreme Court review. The crux of the matter in short is that in most reapportionment litigation an election is imminent and correction of a possibly erroneous district court ruling, if not made prior to the election, is impossible because the matter is mooted by the election.

H.R. 8285—SIX-MAN JURIES IN CIVIL CASES

Juries in federal court proceedings, criminal and civil, have been composed of twelve persons from our beginning as a Nation. Indeed, the practice of impaneling twelve jurors goes back to fourteenth century England. There is no express provision of the Constitution specifying the number of jurors in federal cases, and no statute or rule fixes the number for civil juries at twelve. However, some earlier Supreme Court decisions had said, in dictum, that "trial by jury" means "a trial by a jury of twelve." *Capital Traction Co.* v. *Hof*. 174 U.S. 1, 13 (1899). See also *Maxwell* v. *Dow*, 176 U.S. 581, 586 (1900). Consistent with these statements, it was apparently assumed until relatively recently that the Seventh Amendment required a jury of twelve persons in federal civil cases.

That erroneous assumption was laid to rest by the Supreme Court last June. In *Colgrave* v. *Battin*, 41 U.S. Law Week 5025 (1973), the Court sustained a local rule of the United States District Court for the District of Montana providing for six-man juries in the trial of civil cases against contentions that the rule violated the Seventh Amendment's preservation of jury trial rights "in suits at common law." Although history is sketchy on the point, the Court found nothing to indicate that the Framers deemed the number twelve to be a critical feature of the jury trial right. Rather, the Framers were "concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury." (Emphasis by the court.) Id. at 5027. In other words, the question presented by the Seventh Amendment—to which history largely supplies the answer—is whether a particular case is the *kind of case* which would have been triable by a jury at common law.

The Amendment does not speak to such "incidents" of jury trial as juror qualifications, unanimity of verdicts, and, most relevant here, the number of jurors in the box.

The Supreme Court's decision in the *Battin* case was clearly foreshadowed in *Williams* v. *Florida*, 399 U.S. 78 (1970). In *Williams* the Court upheld a Florida robbery conviction, returned by a six-man jury, against contentions that it violated Sixth Amendment rights as incorporated and made applicable to the States by the Fourteenth Amendment. The Court rejected the notion in that context that "the reliability of the jury as a factfinder . . . [is] a function of size." 399 U.S. at 100–101. As Justice Harlan pithily stated in an earlier case, "[T]he rule . . . that 'jury' means 'jury of exactly twelve' is not fundamental to anything: there is no significance except to mystics in the number 12." *Duncan* v. *Louisiana*, 391 U.S. 145, 171, 182 (dissenting opinion). As the Court in *Battin* saw it, the basic question is "whether a jury of 12 is of the substance of the common law right of trial by jury . . . keeping in mind the purpose of the jury trial in . . . civil cases, to assure a fair and equitable resolution of factual issues . . ." *Id.* at 5028. Reiterating its determination in *Williams* that there are "no discern-

ible differences between the results reached by the two different sized juries" and referring to subsequent studies confirming that determination, the Court concluded that the number twelve was not "of the substance of the common law right." *Id.* at 5028–5029. The Court expressly reserved decision of the question whether a jury of less than six would meet constitutional requirements. *Id.* at 5029.

Several significant advantages would accrue to reduction of federal civil juries from twelve members to six. These advantages would include—

ECONOMY

Present federal law provides for payment of a $20 fee for each juror for each day of service. The Court has discretion to increase this fee to $25 in cases where jurors are required to serve more than thirty days on one case. Jurors are entitled to mileage and, in some cases, to subsistence payments. 28 U.S.C. 1871. The average federal juror is paid about $27 per day. In fiscal year 1972, juror payments exceeded $13,500,000. Although no breakdown is available showing the proportion of these payments to jurors serving on civil and criminal cases (many jurors serve on both), it is evident that reduction of the size of the civil juries by 50 percent would entail a considerable saving in fees alone.

EXPEDITION OF TRIALS

Selection of the jury—technically called the *voir dire* examination—can be a time-consuming process, particularly in a vigorously contested case. Reducing jury size by half would not cut the time required for *voir dire* by fully half, because in most cases the court puts questions bearing upon potential disqualification for bias to the entire panel simultaneously. However, the time for individual questioning of jurors by the court and counsel would be reduced by half, and that process is frequently quite time-consuming.

In addition, reduction of jury size would save time at several points in the typical trial. Viewing of exhibits by the jury could be done more quickly. Polling the jury would take half as long as at present. And it is obvious that a six-man jury is a much more manageable body to work with than the traditional jury of twelve. The smaller group moves in and out of the jury box more quickly and is much more likely to return from lunch or a recess on time, with its members intact. The time devoted by court personnel to selecting and summoning potential jurors would be significantly reduced. Finally, it is likely, but difficult to prove, that six jurors will, on the average, come to a unanimous decision more quickly than twelve, and that there will be fewer "hung juries."

Each of these time-saving features would translate in the aggregate into substantial monetary savings, perhaps greater than the savings to be realized in jurors' fees. And, of course, savings in time and money, while beneficial, are not in this context ends in themselves. Perhaps the greatest benefit to be derived would be quicker trial of civil cases now languishing on the dockets of many of our overburdened courts. Speedier trials of these cases will improve the quality of justice.

LESSENING THE BURDEN OF JURY SERVICE

While I have no wish to denigrate jury service as a civic duty, it has long been realized that jury service is burdensome to many of our citizens. It was noted in the time of Henry VIII that—

> The King's most loving Subjects are much travailed and otherwise encumbered in coming and keeping of the said six Weeks Sessions, to their Costs, Charges, and Unquietness. 37 Hen. 8, c. 7.

Although federal jury fees were raised a few years ago from $10 to $20 for each day of service, the present fee does not represent adequate substitute compensation for many people, particularly wage-earners. The $20 per day figure represents an annual income rate of about $5,000, close to the poverty line for urban families of four. It can be argued that these burdens should nevertheless be borne in criminal cases, where the larger jury, coupled with the unanimous verdict rule, arguably gives the defendant a better break. It is difficult to see, however, how that rather speculative calculus has any relevance to the appropriate damage award in a tort case, and even in a criminal trial, the object is to provide a fair trial, not to give the defendant a better break.

I do no mean to suggest that the 12-man jury in civil cases is a total anachronism and that no case can be made for its retention. As Justice Harlan has observed, "It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law," *Duncan* v. *Louisiana*, *supra*, at 187 (dissenting opinoin). Indeed, jury service is probably the only opportunity most average citizens have for direct participation in the administration of justice, a process frequently criticized as remote and impersonal.

And it is also true that six-man juries will tend to be somewhat less representative in communities that are highly stratified or ethnically and racially diverse. For example, in a judicial district that is 10 percent black, and assuming a representative jury pool, the chances are better than ever that at least one black person will be in the jury box.

With a six-man jury, the chances for that result are less than even. However, the jury is not intended to be a political organ. The Supreme Court has long held that members of minority groups are not constitutionally entitled to proportional representation on particular juries, and the practical reasons underlying this rule are compelling. See, *e.g. Swain* v. *Alabama*, 380 U.S. 202 (1965). It is enough if the system, over time, operates to produce cross-section juries viewed in the aggregate. Tested by that standard, six-man juries are as fair as twelve-man juries.

It has been argued that six-man juries will produce results different from those produced by twelve-man juries. See Zeisel, *And Then There Were None: The Diminition of the Federal Jury*, 38 U. Chi. L. Rev. 710 (1971). However, I find this argument highly speculative. And even assuming that "different" results might ensue, it does not follow that one set of results is necessarily "better" than another, provided both are fundamentally fair.

Moreover, as the Supreme Court recognized in the *Battin* case, other more recent studies "have provided convincing empirical evidence of the correctness of the conclusion that there is no discernible difference between the results reached by two different-sized juries." *Id.* at 5029. I submit that, owing to the nature of the problem, no empirical study will ever demonstrate conclusively whether significantly different results will occur in this setting. But the weight of the available evidence strongly supports the common-sense conclusion that, on the average, six men will arrive at about the same damage verdict as would twelve.

Over half of the federal district courts and the Superior Court for the District of Columbia are now using six-man juries in some or all civil cases. See 1972, Annual Report of the Director, Administrative Office of the United States Courts, p. II–90; Devitt, *The Six Man Jury in the Federal Court*, 53 F.R.D. 273, 277. The *Battin* decision makes it clear that such juries are constitutional, and their widespread acceptance by the bench and bar is perhaps the strongest proof of their efficiency and reliability. The principal purpose of H.R. 8285 would be to make use of six-man juries uniform in all federal trial courts and in all civil cases triable by jury.

Support for the six-man jury is broad and impressive. Chief Justice Burger has endorsed the concept. The Judicial Conference of the United States has endorsed the six-man jury in principle. The great weight of scholarly commentary favors its adoption.

In endorsing enactment of H.R. 8285, we suggest two clarifying changes. First, the wording of proposed section 1875 might be read as expanding jury trial rights beyond those classes of cases in which juries are presently provided by virtue of the Seventh Amendment or by a particular federal statute. We suggest that this wording be clarified to show that no such expansion is intended. Second, and related to the preceding point, the phrase "civil case at law" in the same section suggests that the six-man limit might not be applicable to advisory juries empaneled in equity cases. See Fed. R. Civ. Proc. 39(c). The bill should make it clear that the six-man limit applies in all non-criminal jury cases. I have some suggested language that would be responsive to these points.

In concluding my testimony, let me stress the Department's conviction that these are important bills warranting swift enactment. Although the federal judicial system has been improved substantially in recent years, his critically important and complex system is still under great stress. H.R. 8285 and S. 271 would contribute substantially to the alleviation of that stress, and to the speedier and fairer administration of justice.

Mr. KASTENMEIER. Thank you very much, Mr. Dixon, for your helpful comments.

Do I understand that the Justice Department preferred H.R. 8285 to the Senate version?

Mr. DIXON. We do——

Mr. KASTENMEIER. I am sorry. There is a comparable bill on the Senate side comparable to H.R. 8285 and it provides for unanimous verdicts. It is S. 2057.

Mr. DIXON. I must apologize, Mr. Chairman. We have not focused on the Senate bill. We could send in a statement relating our present comments on H.R. 8285 which we do support to the Senate bill and I will be pleased to do that if you request.

Mr. KASTENMEIER. We would be very pleased to have your additional comments. As I understand it S. 2057 represents the latest amended, approved version by the Judicial Conference which for reasons are not completely clear to me requires a unanimous verdict of a six-man jury. The earlier version did not specify that, left that, I gather, unsettled.

[Subsequently by letter dated December 4, 1973, Mr. Dixon submitted the following comments:]

DECEMBER 4, 1973.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During my recent appearance before your Subcommittee in which I presented the position of the Department of Justice on S. 271, relating to three-judge district courts, and H.R. 8285, relating to six-person juries in federal civil cases, several members of the Subcommittee requested that I submit additional comments for the hearing record on related matters. This letter responds to those requests.

First, you asked that I provide you with the Department's position on S. 2057, a bill introduced by Senator Burdick relating to six-person juries. S. 2057 is identical to H.R. 8285 in providing for six-person juries in federal civil cases, but it contains two additional features. First, it would provide expressly for unanimity of civil jury verdicts, unless the parties stipulate otherwise. (The unanimity requirement is implicit in H.R. 8285.) Second, it would treat several defendants or several plaintiffs as a single party for the purpose of making peremptory challenges only if their interests are similar, leaving to the court discretion to grant additional peremptory challenges in appropriate circumstances.

The Department of Justice believes that these features of S. 2057 are sound, and would support enactment of that bill, in lieu of H.R. 8285. Under existing case law, a serious constitutional question would be raised under the Seventh Amendment if less-than-unanimous verdicts were provided for in federal civil cases. The Supreme Court has twice stated that the Seventh Amendment requires unanimity in civil jury verdicts. *American Publishing Co.* v. *Fisher*, 166 U.S. 464, 467–68 (1897); *Springville* v. *Thomas*, 166 U.S. 707 (1897). Those cases were recently cited with approval by Mr. Justice Powell concurring and Mr. Justice Douglas dissenting in *Johnson* v. *Louisiana*, 406 U.S. 356, 370 n.5, 382 (1972). Additionally, *American Publishing* characterized the unanimity requirement as one of "substance" and not of form. That characterization has significance in light of *Colegrove* v. *Battin*, 37 L.Ed. 2d 522, 528 (1973), upholding the constitutionality of six-person federal civil juries, in which the Supreme Court concluded that the Seventh Amendment protects the "substance" of the common law right to trial by jury, as distinguished from mere matters of "form." However, an argument can be made that *Johnson* v. *Louisiana* and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), holding that the Constitution does not require unanimous 12-person jury verdicts in State criminal cases,[1] and *Colegrove* v. *Battin* indicate

[1] However, a majority of the Supreme Court in *Johnson* indicated that unanimous jury verdicts were required under the Constitution in federal criminal cases. See, 406 U.S. at 395.

that the Supreme Court has adopted a flexible approach in the interpretation of the constitutional civil and criminal jury trial provisions and thus might uphold less-than-unanimous verdicts in federal civil jury trials.

In addition to the constitutional uncertainty raised by less-than-unanimous civil jury verdicts, policy reasons militate against its adoption. One may reasonably speculate that if unanimity were not required, jury deliberations would be accelerated somewhat, and hung juries would be somewhat less likely to occur. However, there is at the present time no way to demonstrate empirically that these results would ensue from a less-than-unanimous verdict rule. And, of course, the proposed reduction in jury size from twelve to six should markedly accelerate jury deliberations and may reduce the incidence of hung juries—the latter a rare phenomenon in civil cases in any event. In sum, we have had twelve-person juries and the unanimity rule in federal civil cases for almost two hundred years. The proposed reduction in the size of juries is itself a major change. By also changing the traditional unanimity requirement our federal civil jury system would be torn too far from its origin in one leap.

In conclusion the Department of Justice believes that six-person juries should be allowed to operate under the traditional unanimity rule for some significant period of time, before further major changes in the system are considered. That, at least inferentially, was the conclusion of the Judicial Conference of the United States, which had endorsed S. 2057.

The other feature of S. 2057 which differs from H.R. 8285 would permit treatment of several defendants or several plaintiffs as a single party for the purpose of making peremptory challenges "if their interests are similar." Although we have no objection to this provision, the word "similar" should be clarified to provide a judge with better guidance in determining whether this provision applies in a given case. As a technical matter, section 2 of S. 2057 is apparently intended to amend the first paragraph, not just the first sentence, of secton 1870 of title 28, United States Code.

We also note that the bill does not affect Rule 47(b) of the Federal Rules of Civil Procedure, which permits the court to direct the calling and impanelling of not more than six alternate jurors. The Committee may wish to consider whether this rule should be changed to provide for no more than three or four alternate jurors.

Congressman Danielson asked me to consider and comment on the possibility of providing for a "5/6ths" verdict—i.e., a jury verdict resting on the votes of five of the six jurors. Aside from the constitutional question raised, if we were to depart from the traditional unanimity rule, a "5/6ths" rule might well be the desirable formula. Anything short of that would leave us with a majority vote rule on a six-man jury. However, from what I said earlier, we do not believe that this is the appropriate time to depart from the unanimity rule.

Congressman Drinan asked me to comment on his suggestion that we provide for twelve-person civil juries at the option of the plaintiff. The Department would be opposed to such an option. The reasons for reducing civil juries from twelve to six are, in our view, quite compelling. We believe that giving either party an election for a jury of twelve would substantially defeat the purposes of the legislation.

Congressman Drinan also asked whether the Department played any role in the *Battin* decision. It did not. Judge Battin was represented by private counsel, Cole Crawley of Billings, Montana. Although several organizations filed amicus curiae briefs in *Battin*, the Department did not do so.

Sincerely,

ROBERT G. DIXON, Jr.,
Assistant Attorney General, Office of Legal Counsel.

Mr. KASTENMEIER. I have two other questions. You have heard colloquoy this morning between the gentleman from Massachusetts and the judges as to whether the Federal courts system should have gone to a six-man jury on the basis of the Supreme Court decision inasmuch as there is a section cited by the gentleman from Illinois that presupposes a 12-man jury and statutory form——

Mr. RAILSBACK. It is a rule.

Mr. KASTENMEIER. Is that a rule?

Mr. RAILSBACK. Yes, it is a rule.

Mr. MOONEY. A rule of civil procedure.

Mr. KASTENMEIER. Oh, it is a rule of civil procedure.

Mr. RAILSBACK. Rule 48.

Mr. KASTENMEIER. In any event, do you agree that there is some question whether the Federal courts should have assumed the right to introduce six-person panels notwithstanding a lack of statutory support therefor?

Mr. DIXON. Well, Mr. Chairman, that goes to a large question of separation of powers and the extent to which the Federal judidiary, under article III, as a separate branch of the Government, has some independent constitutional power to regulate by rule or similar process the conduct of their business. Tradition, of course, as you know, has gone in the direction of substantial reliance on the statutory process for providing rules for the Federal judicial system. As a matter of first impression, it could have gone either way, I am sure. However, the earlier case, the *Williams* v. *Florida* case, gave a strong signal that six-man juries were permissible in State criminal cases. That would seem to provide a fair basis of assurance to the judges who introduced the Federal rule that they were on a solid constitutional foundation in following the *Williams* case. That leaves the question open whether they were on a solid foundation policywise, separating out the policy basis for action on which *Williams* v. *Florida* rested and the constitutional aspect.

I think that we can turn around on that question and have many different viewpoints on it looking back to the past. But starting at the present for the baseline, we do find that Justice Brennan, writing for the five-man majority in *Colgrove* v. *Battin* last June, did devote one section of his opinion to the question of rule 48 and thought it was not a bar, it did not operate as a congressionl bar to judicial discretion which was exercised, and it was challenged in that case. Well, since five of the justices, Justice Brennan writing the opinion, discussed the matter frontally, it seems to me that that matter has become academic perhaps. But it is still, of course, true that there is a power of Congress to dispose of that matter, and it can go either direction policywise most certainly.

Mr. KASTENMEIER. Another question arises concerning your office's evaluation of the desirability of the enactment of these two pieces of legislation, and particularly the former one, S. 271, regarding a three-judge court. What factors did you take into consideration? I ask it in the context of understanding that the Judicial Conference, in its deliberations, was mostly interested in the administration of justice from the standpoint of expedition and efficiency. In that context, the argument is, I think, overwhelming. Yet, here again the gentleman from Massachusetts raises another question, to what extent did you consider whether such a forum might be desirable in terms of litigants and their preferences? Or was this not necessarily a factor which it was incumbent upon you to weigh? In what context did you view it? Was it the case with the Judicial Conference, as I assume, broadly in furtherance of the public interest?

Mr. DIXON. Mr. Chairman, we were influenced by the many reports of persons who have supported a substantial abolition of the three-judge courts. We did not get into the question of forum shopping or how that might be affected by the availability or not of a three-judge

court. We were quite concerned about the facts as noted in part of my statement—and I did not read that—that a veritable mess has arisen over the question when is a three-judge court required and when is it not required. The law is deceptively simple on its face in regard to requirements of three-judge courts when the constitutionality of statewide enactments are challenged.

We did not get into the question of what is a statewide enactment, and I recall that in the reapportionment field when the attention moved from State legislative reapportionment down to local apportionment, county boards and city boards and the like, three-judge courts were frequently impanaled because the localities received all of their powers from the State, and they rested on a State law in the makeup of their county boards.

And it was felt that a three-judge court should be utilized.

However, in two cases, one that I worked on, the cases got all the way up from the three-judge court to the Supreme Court, were briefed and argued on the merits, and then they were dismissed from the docket because the Court decided that on a close analysis of the content of the two State laws concerned, they were strictly local in application and a one-judge court would suffice.

The cases are *Board of Supervisors of Suffolk County* v. *Bianchi*, a New York State case; and *Moody* v. *Flowers*, from Alabama, both found in 387 U.S. 97.

More of this, of course, is elaborated in Professor Wright's book on Federal jurisdiction. There is a factor of confusion and time loss in deciding when a three-judge court is required and when it is not required.

A further factor we considered was the controversy surrounding the minicourt discussion. As you know, Mr. Chairman, the minicourt controversy has given rise to a new commission appointed in part by the President, in part by the Chief Justice and in part by the Speaker of the House and in part by the President pro tem of the Senate, a 16-man commission to study not merely revision of the Federal appellate circuits but also to study the whole problem of expedition of cases so that we can handle evergrowing numbers of cases with our foreseeable judicial manpower.

Mr. KASTENMEIER. Let me amplify my question, posing it in a slightly different way. Let us assume that several civil rights groups on reexamination of this bill were to say that for stated reasons which they set down they feel that elimination of a three-judge district court would be disadvantageous to the pursuit of litigation in those fields. Should that not be persuasive to this committee or to the Department of Justice, assuming they made a compelling argument?

Mr. DIXON. Well, Mr. Chairman, as I said at the end of my statement, we all must learn from experience and if evidence we do not have before us is brought forward, that should be evaluated.

It might give us pause.

But, then there is a difficult tradeoff. How much is the advantage to the given litigant if he has a three-judge court, versus what the outcome might be if he had a one-judge court. And I think I can see the situation where in a given district if the plaintiff knew he would have Judge X he would want Judge X alone and no three-judge court along with Judge X. And there are tradeoffs here.

We must also bear in mind that we are not talking about a final judgment by a one-judge court in a civil rights case. Appeal avenues are preserved and the Supreme Court does have power to grant certiorari prior to review in the Court of Appeals.

Mr. KASTENMEIER. Yes.

Mr. DIXON. In a major case.

Mr. KASTENMEIER. I understand that. And as a matter of fact, let the record be clear. Judge Wright indicated that the Conference had checked with the Civil Rights Commission and Father Hesburgh indicated no opposition to this and Counsel hands me a letter dated July 12, 1972 on the predecessor piece of legislation identical to the one before us, S. 3653 which reads as follows:

Thank you for your letter of June 30 concerning our request to testify on S. 3653. We have taken a further look at the bill and have concluded it raises no civil liberties issues which would warrant our appearance as witnesses to any hearings you might hold. Sincerely, Acting Director of the Americal Civil Liberties Union.

So, there is no present indication that the elimination of the three-judge court would prejudice civil liberties or civil rights cases.

But, I raise the hypothetical.

Mr. KELLEY. I just offer one other comment. According to statistics compiled by the Administrative Office, civil rights cases comprised 183 out of the 320 three-judge court cases in 1973. I am just suggesting if you carved out an exception for civil rights cases, the exception might swallow the rule, and you may as well forget about the bill.

I do not know how you would define a civil rights case. Years ago if you sued to desegregate a school that was a civil rights case. The administrative office aggregate figure includes perhaps challenges to welfare eligibility and I have no idea what else. But there may very well be a difficult jurisdictional problem in deciding what are civil rights cases.

Mr. DRINAN. Mr. Chairman. I did not fully understand that. What did you mean that the 183 civil cases, that if we do not exclude them, then just forget about the bill?

Mr. KELLEY. I was just suggesting that that is more than half of the bulk, and the bill does not deal with ICC review orders which is another big chunk. The biggest single batch is what the Administrative Office of the U.S. Court calls civil rights.

Mr. KASTENMEIER. I think what Mr. Kelly is saying that if we were to exempt for any reason civil rights cases we would be defeating statistically more than half the purpose of the bill in relieving the burden.

He did not address himself to the policy, which is for us to determine.

I yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I have no questions, and I simply want to thank Mr. Dixon and his colleague.

Mr. DIXON. Mr. Kelley.

Mr. RAILSBACK. Mr. Kelley, for presenting what I think is a good case for the passage of this legislation.

One thing. The Department of Justice is not sponsoring these bills, am I correct? You are just testifying?

Mr. DIXON. We are testifying on the bills.

Mr. RAILSBACK. Was it not the judicial conference that really was pushing the bills?

Mr. DIXON. That is my understanding and it has a modified version apparently as the Chair has mentioned.

Mr. RAILSBACK. That is all I have.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I have no questions. I thank you and I hope that in your comments that you are going to submit with respect to the three-man or excuse me, the six-man jury you will add a paragraph or two as to the attitude, official attitude of the Department of Justice on let us say a five-sixths verdict under that six-man jury. Would you do that?

Mr. DIXON. A five-sixths verdict?

Mr. DANIELSON. Yes, sir, less than unanimous. Five human being verdict of a six human being jury.

Mr. DIXON. We will look into that very carefully.

Mr. DANIELSON. I would like to have your observations. If you think it puts you in jeopardy you can leave that out.

Mr. DIXON. I testified before Senator Cannon last week or 2 weeks ago and also last June and he frequently wanted to approach my constitutional discussion in terms of the odds of getting this or that through the Supreme Court, and I am always reluctant to play Jimmy the Greek on constitutional issues. But, I will try to explore the thought you have mentioned.

Mr. DANIELSON. Right.

The Department may have some feelings on it.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. I would not delay this. I want to thank both of you gentlemen but may ask this. Did the Justice Department have any position or intervene in the *Colgrove* case?

Mr. DIXON. If I understand your question, did the Department have any——

Mr. DRINAN. Did the Solicitor General come and did he argue that on behalf of the Federal judges?

Mr. KELLEY. We did not——

Mr. DIXON. No, we were arguing the *Colgrove* case as a part of our own preparation of my remarks, and my remarks on *Colgrove* are part of our preparation.

Mr. DRINAN. You argued the winning side, Justice?

Mr. DIXON. Oh, I——

Mr. KELLEY. I do not believe we participated in that case.

Mr. DRINAN. Maybe you did not intervene. I do not know who argued on behalf of the Federal judges.

Mr. DIXON. I do not know either, but we can incorporate that in our response.

Mr. DRINAN. All right, thank you.

Another question. In your little suggestions toward the end you really recommend a total wipe-out really of 12-person juries and I find that somewhat inconsistent with your statement on page 18 where you say that the 12-man jury is not a total anachronism nor that no case can be made for its retention. You want to tighten the legislation and say bye-bye 12-person jury forever in Federal courts in civil cases.

Now, I have one last question. Have you people considered the possibility of making this optional, at the option of the plaintiff? And I

am thinking particularly in view of the concession that you have made expressly on page 18. You have conceded that in a community that is ethnically and racially diverse the chances of having a fully representative jury pool will be less in a district which is, say, 10 percent black. In view of that and in view of the challenges that may well come, what about making it available at the option of the plaintiff or his attorneys that he may elect 6 or he may elect 12?

Mr. DIXON. We have no final view on that. We have not studied it.

Mr. DRINAN. You have no viewpoint at all? I mean you come out for the six and you do have a viewpoint here. You say I want to wipe out 12 forever and you say the bill should make it clear that the 6 man limit applies in all noncriminal jury cases so you do have a position.

Mr. DIXON. That is our present approach.

Mr. DRINAN. Well, would you change it?

Mr. DIXON. We were not in a dialog on the question of whether the optional feature would be appropriate.

Mr. DRINAN. I think frankly you have made a tremendous concession where you say the Department of Justice would tolerate in favor of the efficiency of Federal courts, you would tolerate a situation where the chances of having a fully representative jury in a civil case are substantially less.

Mr. DIXON. We only achieve full representation by going to juries way beyond 12, which would raise additional problems. There is the appeal process available to take care of problems that do arise and are shown in a jury of 12 or 11 or 6, whether it is a showing of unfairness or whatever.

Mr. DRINAN. All right. I want to thank you.

Mr. KASTENMEIER. On behalf of the committee, Mr. Dixon, and this is the first time you have appeared before us in your capacity as the Assistant Attorney General, we are grateful for your appearance and we look forward to seeing you again.

Mr. DIXON. I am pleased to be here, thank you, Mr. Chairman.

Mr. KASTENMEIER. And you too, Mr. Kelley.

Mr. KELLEY. Thank you.

Mr. KASTENMEIER. Next the Chair would like to express pleasure in having Edmund Campbell who appears on behalf of the American Bar Association Board of Governors, a very distinguished and, indeed, very patient witness. We apologize to him for keeping him so long. Nonetheless, we are pleased that you were able to come today and try to be of some assistance to us. We have your statement before us and you may proceed as you wish. It is a short statement of 4 pages with the report of the Special Committee on Coordination of Judicial Improvements and you may proceed as you wish.

TESTIMONY OF EDMUND CAMPBELL, ESQ., BOARD OF GOVERNORS, AMERICAN BAR ASSOCIATION

Mr. CAMPBELL. Mr. Chairman, I appear on behalf of the president of the association, Mr. Chesterfield Smith, and at his request to state the position of the American Bar Association on this bill providing for the abolition of three-judge courts in certain cases.

With the committee's permission, on that phase of the matter, I will simply file the statement and make one or two additional brief comments.

Mr. KASTENMEIER. Without objection, your statement will be received with the special committee report and made a part of the record.

[The statement of Mr. Campbell and attachment thereto follows:]

STATEMENT OF EDMUND D. CAMPBELL ON BEHALF OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF S. 271 THREE-JUDGE DISTRICT COURT REVISION

Mr. Chairman and Members of the Subcommittee, my name is Edmund Campbell. I am a practicing lawyer in Washington, D.C., and a member of the American Bar Association's Board of Governors. I appear today on behalf of the ABA to extend the Association's support for repeal of certain sections of Title 28, United States Code, providing for three-judge district courts.

In February of this year the Association's House of Delegates adopted a resolution urging Congress to repeal sections 2281, 2282 and 2325 of the United States Code as unnecessarily requiring three-judge district courts in certain cases. The pending legislation, S. 271, which passed the Senate on June 14, would repeal sections 2281 and 2282, as we recommend, does not repeal section 2325, as we would, and would amend sections 2284 and 2403, on which we have no recommendations.

Briefly, I would like to discuss the reasons for our position and the significance of the differences between S. 271 and our recommendation.

There appears to be overwhelming support for the first two sections of this legislation repealing the requirement for three-judge courts in cases for interlocutory or permanent injunctive relief for the enforcement of a state statute or act of Congress alleged to be contrary to the federal Constitution.

However, a porion of this jurisdiction is reinstated in an amended section 2284, which provides that three judges shall continue to hear cases challenging the constitutionality of the apportionment of congressional districts or statewide legislative bodies.

I would like to reiterate that the Associtaion did not suggest the amendment of section 2284, nor did it consider the desirability of specifically retaining jurisdiction over apportionment cases otherwise repealed by sections 2281 and 2282. However, without passing on the merits of this provision, I observe that apportionment cases before three-judge courts have averaged fourteen a year for the past ten years. From the standpoint of one of the reasons for this legislation, to reduce the excessive time required of three judges and to lessen the number of three-judge court decisions appealed directly to the Sureme Court, the retention of apportionment cases does not appear to have as adverse an impact as that caused by suits to enjoin orders of the Interstate Commerce Commission.

Our study, as well as that of Professor Freund's committee indicates that the special treatment afforded I.C.C. rulings creates an unnecessary burden, both on the time of the three judges required and on the time of the Supreme Court required to hear such appeals directly. There is no reason why such appeals should not be treated as ar other agencies under 5 U.S.C. § 1032. Furthermore, it should be noted that over the past ten years three-judge courts have heard an annual average of over 56 cases reviewing I.C.C. orders.

The Association is in full agreement with the Freund Committee Report which notes that:

> In recent years the [Interstate Commerce] Commission has abandoned its opposition to similar treatment for its orders. Proposals for review of ICC orders by the courts of appeal, supported by the Judicial Conference of the United States and, so far as we know, opposed by no one, have been before Congress for several years. Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders [under 28 U.S.C. § 2325] is a burden on the Supreme Court that can no longer be justified. (*Report of the Study Group on the Caseload of the Supreme Court*, December, 1972, at pp. 27–28).

Thus, I urge this Subcommittee to amend S. 271 by expressly repealing section 2325.

As I stated earlier the American Bar Association has no opinion on those portions of this legislation concerned with the composition and procedure of three-judge courts and the right of states to intervene in cases enjoining allegedly

unconstitutional state laws (§ 3 and § 5, S. 271). Additionally, the report of the Special Committee on Coordination of Judicial Improvements, which I have attached for inclusion in the record, notes that the American Bar Association has not considered the other situations for which Congress has mandated a hearing by a three-judge court with direct appeal to the Supreme Court. Specifically mentioned in this category are the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

The enactment of S. 271, which the American Bar Association feels should be amended to repeal section 2325, would significantly reduce the use of cumbersome three-judge district courts, would aid in decreasing the soaring caseload of the Supreme Court and would result in a more equitable and contemporary federal system of justice. For the American Bar Association, I urge your speedy consideration of this important legislation.

AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON COORDINATION OF JUDICIAL IMPROVEMENTS, FEBRUARY 1973

RECOMMENDATION

Resolved, That the Congress repeal 28 U.S.C. §§ 2281 and 2282 which provide for a three-judge district court with direct appeal to the Supreme Court of the United States when the constitutionality of a state or federal statute is challenged and 28 U.S.C. § 2325 which provides for three-judge district courts with direct appeal to the Supreme Court of the United States for review of orders of the Interstate Commerce Commission; and

Further resolved, That the President or his designee be authorized to urge the Congress to repeal these sections.

REPORT

In his address at the 95th Annual Meeting of the American Bar Association in San Francisco in August, 1972, entitled "The State of the Federal Judiciary—1972" (*ABA Journal*, Vol. 58, pp. 1049–1053, Oct. 1972), Chief Justice Burger recommended elimination of three-judge district courts. The Chief Justice stated, in part, that such courts now disrupt district and circuit judges' work and that direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its work load since appeals from such three-judge district courts now account for one in five cases heard by the Supreme Court. The Chief Justice further stated that the original reasons for establishing these special courts, whatever their validity at the time, no longer exist and that there are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it.

The Committee's consideration of this problem has revealed that the Chief Justice's views are overwhelmingly supported by the vast majority of federal circuit and district court judges. For example, in testimony given before the Senate Subcommittee on Improvements in Judicial Machinery on May 9 and 10, 1972, both Chief Judge Collins J. Seitz of the United States Court of Appeals for the Third Circuit and Chief Judge John R. Brown of the United States Court of Appeals for the Fifth Circuit vigorously urged the abolition of three-judge district courts. In 1970 the Judicial Conference of the United States recommended repeal of this legislation (1970 *Rept. Jud. Conf.* 78–79) and in recent years the Interstate Commerce Commission has abandoned its opposition to repeal of 28 U.S.C. § 2325. Further, the Report of the Study Group on the Caseload of the Supreme Court dated December, 1972 (pp. 26-30) prepared for the Federal Judicial Center by a committee under the Chairmanship of Professor Paul A. Freund of Harvard Law School similarly recommended repeal of these sections.

Although there are other situations in which the statutes provide for a three-judge district court with direct appeal to the Supreme Court of the United States, i.e., the Civil Rights Act of 1964 (42 U.S.C. §§ 1971g, 2000a–5(b), 2000c–6(b)), and the Voting Rights Act of 1965 (42 U.S.C. §§ 1973b(a), 1973c, 1973h(c)), the Committee does not, at this time, take a position with reference to these sections. The Committee intends to give the question of the repeal of these sections further study and will make its recommendations with respect thereto at a future time.

Respectfully submitted,

C. Frank Reifsnyder, *Chairman*, Warren Christopher, William P. Dickson, Jr., Robert J. Kutak, Robert A. Loflar, Francis T. P. Plimpton, Terry Sanford, Joseph D. Tydings, Theodore Voorhees.

Mr. CAMPBELL. The 318-person house of delegates of the American Bar Association overwhelmingly endorsed the proposal to abolish three-judge courts in certain cases, by repeal of sections 2281 and 2282. They also, as part of the resolution, requested the abolition of three-judge courts in Interstate Commerce Commission cases.

I understand that is not specifically before you and is in other legislation but I do want to get the association on record in that respect.

It is conceivable to me that you might even wish to amend your bill to include that.

The association did not specifically address itself to the question of the reservation of three-judge courts as the Senate bill does in apportionment cases, and I cannot state a specific position for the association in that regard. All I can say is that the house of delegates did not make any exception as to that.

The association has been greatly concerned over the terrific load on the Supreme Court of the United States; 22 percent of the cases orally argued before the Supreme Court in this last term have been, as I understood it, cases involving direct appeals from three-judge courts. As the Chief Justice has stated, the burden of these appeals from three-judge courts is rather overwhelming on the Court and it has to have some relief.

In the opinion of the American Bar Association, as expressed by its house of delegates, the need for three-judge courts is largely no longer existent. I adopt the arguments made by Judge Skelly Wright, who has expressed the opinion of the Judicial Conference on the subject; and who has stated thoroughly adequate reasons for why this committee should favorably report this bill.

With respect to the six-man jury bill, the American Bar Association has not yet taken any position on the subject. The matter has been considered sympathetically by certain committees of the association. The board of Governors of the association will meet later this month. With the permission of the committee, if the board of Governors takes a formal position with respect to the matter at its meeting or if at a later date the house of delegates takes a formal position before action is taken on this bill I would like permission to file with the committee the recommendations of the association.

Mr. KASTENMEIER. The committee would very much appreciate receiving any action by the bar association, American Bar Association, or any of its constituents on this bill or any other before the subcommittee.

Mr. CAMPBELL. If I can simply add one personal word, as a trial lawyer who has appeared before three-judge courts on a number of occasions, it is not easy to try a case before a three-judge court from the point of view of a plaintiff. A three-judge court is impaneled from a circuit court of appeals and district court judges. It is hard to get them together.

They insist almost uniformly and universally that all testimony be taken in advance by depositions. They want to hear the case and dispose of it generally before lunch. A case cannot be tried in the normal manner before a three-judge court.

From the point of view of a plaintiff, whether the plaintiff be a civil rights plaintiff or any other kind of plaintiff, I think that he is generally better off in trying a case before a single judge. And now that

the Supreme Court has largely delineated the legal framework which formerly formed the basis of appeals in many of these cases, I think the need for the three-judge court has been largely dissipated. I will be glad to answer any questions the committee may have.

Mr. KASTENMEIER. Thank you very much, Mr. Campbell. Are you a member of the Special Committee on Coordination of Judicial Improvements of the American Bar Association?

Mr. CAMPBELL. I am a liaison representative from the board of governors to that committee, and I sit with that committee in its meetings.

Mr. KASTENMEIER. Does that committee comprise attorneys that have practiced, pursued cases in the three-man Federal district court?

Mr. CAMPBELL. I am sure that a majority of the members of that committee have practiced in such matters.

Mr. KASTENMEIER. As far as you are familiar with the practice, does it run across the spectrum of the type of cases; that is to say, ICC cases, possibly reapportionment cases, and so forth?

Mr. CAMPBELL. You mean my personal practice?

Mr. KASTENMEIER. Not your personal practice, but the practice of those attorneys comprising the committee. Does it represent the broad spectrum of classes of cases brought before the three-judge district courts? That is to say, civil rights, ICC, Expediting Act cases, and other cases?

Does their experience represent broadly the practice before three-judge courts?

Mr. CAMPBELL. I cannot answer that either affirmatively or negatively. I know they represent a rather broad spectrum of practice. Certainly, however, the house of delegates, which accepted this report overwhelmingly, represents a complete sepctrum of practice.

Mr. KASTENMEIER. What I am driving at is to determine whether the American Bar Association adopted this with those participating who have in fact practiced or engaged in this sort of practice and would know whether any litigant interests would be compromised by the ending of the three-judge district court.

Mr. CAMPBELL. I am sure that question can be answered in the affirmative, that they did have those considerations in mind.

Mr. KASTENMEIER. I have no other questions. I appreciate your testimony.

I will again yield to the gentleman from Illinois.

Mr. RAILSBACK. I have no questions, Mr. Campbell, and I thank you for appearing before us on behalf of the ABA.

Mr. KASTENMEIER. The gentleman from California?

Mr. DANIELSON. Thank you very much, sir. No questions.

Mr. KASTENMEIER. The gentleman from Massachusetts?

Mr. DRINAN. Mr. Campbell, we admire your patience and we are sorry it has been so long, but your testimony is very valuable, thank you.

Mr. CAMPBELL. Thank you.

Mr. KASTENMEIER. Thank you, sir.

This terminates the subcommittee hearings on S. 271 and H.R. 8285; and accordingly, the subcommittee stands adjourned.

[Whereupon, at 1:20 p.m., the hearing was adjourned.]

[Subsequently, the following was submitted for the record.]

STATEMENT OF CHARLES G. NEESE, U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE, IN SUPPORT OF S. 271, WHICH WOULD ABOLISH THREE JUDGE DISTRICT COURTS IN MANY SITUATIONS

This bill would continue to require three judge district courts in cases involving congressional redistricting, legislative reapportionment, or in any other situation expressly required by the Congress. It would eliminate the requirement of three judge courts in a wide range of litigation which now consumes needlessly so much of the time of federal district judges and circuit judges.

Experience has demonstrated that three judge courts are an inefficient strain upon judicial manpower. Three federal judges, who already are swamped with ever-growing dockets, must interrupt their dockets to hear a three judge case which adequately could be heard by one District Judge and reviewed by the Court of Appeals.

For example, when a three-judge court is convened in the Eastern District of Tennessee, either Circuit Judge Harry Phillips or Circuit Judge William E. Miller of Nashville must make a trip to Knoxville, Chattanooga, Greeneville or Winchester, requiring a part of at least two days of travel and hearings. Two of the three District Judges for the District must rearrange their dockets. An important criminal case may have to be continued to a later date, at a time when every priority is being given to the prompt hearing and disposition of criminal cases.

This proposed legislation has been approved repeatedly by the Judicial Conference of the United States. It also has been recommended, but in a somewhat different form, by the America Law Institute. I am confident that the views which I expressly are shared unanimously by all members of the federal judiciary.

S. 271 has been passed by the Senate. I urge that it be reported favorably by the Judiciary Committee and approved by the House during the current session of the Congress. The enactment of this proposed legislation will eliminate a waste of judicial manpower and permit federal judges to devote more of their time to their crowded dockets.

Most of the three judge cases to which I have been assigned have involved relatively simple issues. It is an uneconomical use of judicial manpower to tie up the time of a Circuit Judge and two District Judges on litigation of this kind.

The recent report of the "Freund" Committee points out the heavy burden which is placed upon the Supreme Court by direct appeals from three judge courts. It would be better procedure to have these cases tried by one District Judge, reviewed by the Court of Appeals and considered by the Supreme Court on petition for certiorari.

THREE-JUDGE COURT AND SIX-PERSON CIVIL JURY

WEDNESDAY, JANUARY 23, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:15 a.m., pursuant to call, in room 2226, Rayburn House Office Building, Hon. Robert M. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Railsback, and Cohen.

Bruce A. Lehman, counsel; and Thomas E. Mooney, associate counsel.

Also present: Herbert Fuchs, counsel; William P. Dixon, counsel;

Mr. KASTENMEIER. The hearing will come to order.

The Subcommittee on Courts, Civil Liberties, and the Administration of Justice has reconvened this morning to receive further testimony on S. 271 and H.R. 8285, two bills designed to expedite the administration of justice in our Federal courts.

S. 271, entitled a bill to improve judicial machinery by amending the requirement for a three-judge court in certain cases (would sharply reduce the number and kind of instances in which trial before a three-judge court is now required. It passed the Senate on June 14, 1973.

H.R. 8285, entitled a bill to amend title 28, United States Code, to provide in civil cases for juries of six persons, was introduced by Chairman Rodino at the request of the Judicial Conference of the United States. It would render uniform the number of jurors in Federal civil cases at six, unless the parties stipulate to a lesser number. A slightly variant measure, S. 2057, is pending in the other body.

The text of these measures is already before us, having been placed in the record at an earlier public hearing before the subcommittee on October 10, 1973. At that hearing the subcommittee heard testimony from Judge J. Skelly Wright, chairman of the Judicial Conference Committee on Federal Jurisdiction in support of S. 271. Testimony favorable to that bill was also received from representatives of the Department of Justice and of the American Bar Association. On the same occasion, testimony favorable to H.R. 8285 or a variant thereof was received from the Justice Department representative and from Judges Arthur J. Stanley, Jr., chairman of the Judicial Conference

Committee on the Operation of the Jury System and Judge Edward J. Devitt, chief judge of the U.S. District Court, District of Minnesota.

At the earlier hearing question arose as to the present position of the civil rights organizations on the pending proposals. The subcommittee had learned that in the 92d Congress the U.S. Commission on Civil Rights and the American Civil Liberties Union had indicated that there were no objections to the three-judge court legislation from their civil rights point of view. This situation appears now to have changed at least in part. We expect to hear today testimony reflecting the views of the National Association for the Advancement of Colored Persons on both bills and those of the ACLU on H.R. 8285. We shall also hear from Prof. Hans Zeisel of the Chicago University Law School on the latter measure.

By letter dated October 30, 1973 ,and in response to a request from the Chair, the Director of the Administrative Office of the United States Courts forwarded a tabulation showing the nature of the civil actions which the Administrative Office listed as "civil rights cases." Also, the Chair is in receipt of a communication from Prof. Anthony Amsterdam of Stanford Law School opposing enactment of S. 271. These submissions have been distributed to the members and will be placed in the record.

[The documents above-noted follow:]

SUPREME COURT BUILDING,
Washington, D.C., October 30, 1973.

HON. ROBERT W. KASTENMEIER,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: In response to your request of October 10, 1973, we enclose a special tabulation showing the nature of the civil action which we classified as civil rights cases in both fiscal year 1972 and 1973. Appended to this listing are our worksheets which are based on reports received from clerks of court in the district courts who made the original reports to us.

Prior to fiscal year 1972 we received only the numbers of such three judge courts and our summaries included only the classifications noted in the Annual Report of the Director. Thus, only ICC cases, civil rights, reapportionment, and others not classified in the prior three groups were provided.

From the appendices it can be seen that litigants which seek an injunction and have their cases heard by three judges cite not only 28 U.S.C. 2281 and 2282 but many cite 42 U.S.C. 1983 and 28 U.S.C. 1343 as well and a few cite various amendments to the United States Constitution and state statutes or constitutions. You will note that in 1972 and 1973, of the 349 total civil rights cases heard by three judge courts, only two involved an allegation dealing with racial discrimination. There was one case arising in Southern Texas in 1972 and one case arising in Connecticut in 1973.

Please let me know if we can be of further assistance.

Sincerely yours,

ROWLAND F. KIRKS,
Director.

Enclosures.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES IN FISCAL YEARS 1972 AND 1973—SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION

Type of civil rights case	Fiscal year— 1972	1973
Total	166	183
Abortion laws	8	3
Assistance to nonpublic schools	4	3
Education for the handicapped	2	1
Employment		8
Expelling students		3
Housing	3	3
Obscenity	7	12
Prejudgment attachments, seizure of property without notice	4	10
Penal codes and prisoner petitions	12	11
Residency requirements	21	25
Sobriety tests		2
Taxes	5	3
Voting and election laws	35	30
Welfare, social security, and unemployment benefits	28	28
Consttutionality of a State statute (not classified above)	9	12
Other (not cited in sufficient frequency to classify above)	28	29

Note: The total number of 3-judge court hearings held in fiscal years 1972 and 1973 were 310 and 320, respectively. A distribution of these cases is as follows:

	Total	Review of ICC orders	Civil rights	Reapportionment	All other
Fiscal year:					
1972	310	52	166	32	60
1973	320	52	183	7	78

Source: Administrative Office of the U.S. Courts, Division of Information Systems, Washington, D.C.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
FISCAL YEAR 1972		
Abortion laws:		
Rhode Island, 4586	28:2281	Declaratory and injunctive action re State antiabortion statutes.
Connecticut 14291	28:2281	Action brought by women to redress the denial of their constitutional rights resulting from application to them of abortion laws of the State of Connecticut seeking a declaratory judgment and injunctive relief—42 U.S.C. 1983 and 28 U.S.C. 2281 and 2284.
New York, eastern, 72-336	28:2284	Declaratory judgment to prevent further deprivation of women receiving welfare seeking abortions, etc.
Mississippi, southern, 1343	28:2281, 1343	Declare statute of State of Mississippi relating to abortion unconstitutional.
Michigan, eastern, 37444	28:1331, 43	Injunctive relief sought against the enforcement of State statute preventing medical abortion.
Tennessee, middle, 6538	28:2281, 84	Seeking to have Tennessee antiabortion statutes declared unconstitutional.
Oregon, 70-226	28:2281, 84	Type of civil rights matter (abortion).
Kansas, Kc-3411	28:1343(3); 28:1331, 32; 28:2201; 42:1983.	Civil rights—Suit for declaratory judgment and injunction against enforcement of certain provisions in Kansas statutes restricting access to the medical procedure of induced abortion in State licensed hospitals.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civi cases	Citations under which civi rights case was opened	Statement as to the nature of the action
Assistance to nonpublic schools:		
New York, southern 71–3218.	28: 2281, 84	Civilrights—Action for injunction against use of funds of the State of New York to finance operations of schools owned and controlled by religious organizations.
Pennsylvania, eastern 69–1206.	28: 2281	To litigate constitutionality of Pennsylvania Non-Public Education Act.
Mississippi, northern 7053	28: 2281, 84	Seeking temporary restraining order and preliminary and permanent injunction enjoining defendants from providing or permitting the distribution or sale of State purchased and owned textbooks to private racially segregated schools and academies.
Ohio, southern 71–396	28: 1331	To declare unconstitutional a provision of the statutes of Ohio providing for a payment of $90 per year, per child, to the parents of children in parochial or private schools.
Education for handicapped children:		
Pennsylvania, eastern 71–42.	28: 1343; 42: 1981, 83	For declaratory judgment to secure education for retarded children.
Arizona, 71–435	28: 2284	Injunctive and declaratory relief sought under 42 U.S.C. 1983 and 28 U.S.C. 1331, 1343 (d) and (4) re deprivation of constitutional rights in operation of programs for educable and trainable mentally handicapped children.
Housing:		
Pennsylvania, eastern 70–3303.	28: 1343, 2201, 2202, 1331, 42: 1981, 83.	To have part of Pennsylvania Landlord and Tenant Act declared unconstitutional.
Pennsylvania, eastern, 71–2529.	28:2281, 84; 42:1983	Civil rights suit under Landlord and Tenant Act of Pennsylvania.
Florida, southern, 71–628	42:1983, 85; 28:1343 (3 and 4); 2281, 84.	Enforcement of Florida Stats. 713.67, 713.68, and 713.69, eviction and conversion of plaintiffs' property without a hearing, in violation of constitutional rights.
Obscenity:		
Maryland, 72-27	28:2281	To enjoin enforcement of movie censorship statute as applies to adult films shown in coin-operated machines.
South Carolina, 71–944	28:2281, 84	Restrain defendants from enforcing a State statute on seizing alleged obscene films.
Ohio, southern, 70–57	28:1343, 42:1983	To declare unconstitutional statutes of Ohio and regulations of the Department of Liquor Control prohibiting permit holders from offering for sale publications which have not previously been deemed obscene in a prior adversary proceeding before a comparable judicial tribunal.
California, central, 72–30	R.S. 1979, 28:1331, 1339, 1343, 2201, 2202, 2281, 2284; 42:1983.	Declaratory relief for return of U.S. mail, motion picture film, and other property seized.
California, central, 70–2656.	R.S. 1979, 28:1331, 43, 2201, 2202, 2281, 2284; 42:1983.	Complaint for declaratory relief, damages, and injunction restraining seizure of motion picture films.
California, central, 70–1625, 86, 2167.	R.S. 1979; 28:1331, 43 28: 2201, 02, 2281, 84.	Complaint for declaratory relief, damages, and injunction restraining seizure of motion picture film.
California, central, 70–2655, 2751, 2704; 71–35.	R.S. 1979; 28:1331, 43 2201, 02, 2281, 84 42:1983.	Complaint for declaratory relief, damages, and injunction restraining seizure of motion picture film.
Penal codes—prisoner petitions:		
Connecticut, 14386	28:2281	Action (class) brought pursuant to 42 U.S.C. 1983 by inmates of Connecticut mental hospitals, belonging to a class most directly affected by involuntary commitment laws of State of Connecticut, seeking a declaratory judgment that Connecticut Gen. Stats. 17–178 and 17–183 are unconstitutional.
New York, eastern, 71–1087.	28:2284	Civil rights—Declaratory judgment relief to prevent further deprivation under color of sec. 260.10 of New York penal law of rights, etc.
New York, southern, 71–2411.	28:2281, 84	Civil rights—Action to enjoin enforcement of State Law Code of Criminal Procedure.
New York, southern, 71–3276.	28:2284	Civil rights—Action to declare sec. 913(a) of New York Code of Criminal Procedure, unconstitutional.
Connecticut, 14932	28:2281; 42:1983	Class action seeking injunctive relief and declaratory judgment re the denial to plaintiff-inmates earned "good time."
New Jersey, 69–1501	28:2281	Declare State summary hearing and commitment statute re mental illness unconstitutional.
New Jersey, 71–1883 72–44	28:2284	Declare State prison regulations unconstitutional.
Pennsylvania, eastern, 69–1697.	28:2201, 1331, 43 42: 1983	To declare certain Pennsylvania criminal libel statutes unconstitutional.
Pennsylvania, eastern, 69–2981.	28:2281, 84, 1343, 2201, 2202; 42:1983.	To declare Pennsylvania Confession of Judgment Act unconstitutional.
Georgia, northern, 977	28:2281, 84	Civil rights corporal punishment.
Illinois, northern, 72–1112	28:2284	Constitutionality of certain sections, Illinois Juvenile Court Act.
California, northern, 70–1756.	28:2281	Declaratory relief and injunction as to secs. 286 and 288a of California penal code.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Prejudgment attachments:		
Massachusetts, 72-1421	28:2281	State statute allowing prejudgment attachment of bank account without notice and hearing.
Rhode Island, 4399	28:2281	Declaratory and injunctive action re State attachment statutes.
Georgia, northern, 16144	28:2281	Action to declare Georgia statutes providing for pre-judgment garnishment as unconstitutional.
Arizona, 71-644	28:2284	28 U.S.C. 2281 and 2284. Suit challenging the constitutionality of prejudgment garnishment laws of State Arizona, Arizona Rev. Stats 12-1571-1595.
Residency requirements:		
Maine 12-167	28:2281	Civil rights action re right of students to vote in town where they attend college.
Massachusetts, 71-1571	28:2281	Residence provisions of State's veteran's preference Civil Service statute.
New Hampshire, 3483	28:2281	Students desire voting eligiblity in New Hampshire.
Rhode Island, 4684	28:2281	Declaratory and injunctive action re residency requirement for welfare recipients—1971 Rhode Island Public Law, Chapter 290.
Rhode Island, 4883	28:2281	Declaratory and injunctive action re primary crossover statutes.
Connecticut, 14517	28:2281	Class action seeking a declaratory judgment that House bill 9508 insofar as it conditions the receipt of welfare benefits on a 1-year residency requirement, etc., is unconstitutional.
Connecticut, 14548	28:2281	Class action for declaratory judgment declaring unconstitutional and vilative of Federal civil rights laws, title 9, ch. 143, sec. 9-12 of the Connecticut general statutes (depriving students of right to register to vote in place where they reside and attend school).
Connecticut, 14911	28:2281	Class action seeking a declaratory judgment and injunctive relief re 6 months' durational residency requirement to qualify for admission as elector, Connecticut general statutes 9-12 and 9-31e, and art. 6, secs. 1 and 9.
New York, southern, 71-992.	28:2284	Civil rights—Enjoin enforcement of New York State civil service law, sec. 53 which denies appointment for any position in the competitive class of civil service jobs to any noncitizen.
New York, western, 71-308	28:2281	Civil rights suit re constitutionality of New York State welfare residency law.
New Jersey, 1011-71	28:2281, 84(3)	Declare State residency statute for policemen unconstitutional.
Virginia, eastern, 700-71	28:1331, 43 (3 and 4) Violation of 14th amendment.	Declaratory reliet sought, attacking constitutionality of Virginia residency requirements for attorneys.
Florida, northern, 72-24	28:2281	Suit attacking Florida residency requirement for voting registration.
Florida, southern, 70-380	42:1981, 83; 2000(d) 28:1343	Florida Stat. 409.16, residence requirement to collect old age assistance, unconstitutional.
Florida, southern, 71-1170	42:2000(e) 7: 1983, 2000(d); 28:1343, 2281, 84.	Florida Stat. 480.06, denying noncitizens opportunity to be licensed as masseur or masseuse, in violation of U.S. Constitution.
Georgia, northern, 15689	28:2281, 84	Attacks art. II, sec. 2-703 of the Georgia Constitution and Georgia Code, secs. 34-602, 34-609 and 34-631 (requiring 1-year residency in order to vote).
Louisiana, eastern, 71-2631	28:2281	Suit for injunctive relief and declaratory judgment that requirements of citizenship, residence, etc., and change of party affiliation under title 18, Louisiana revised statutes (secs. 270.202 and 270.204) are unconstitutional.
Mississippi, northern, 7141	28:2281	Plaintiff seeks a declaratory judgment, injunctive relief, damages, and enjoining defendants from classifying plaintiff as a nonresident.
Ohio, southern, 8140	42:1971 et seq	Attacking State statutes and regulations regarding place of residence for voting purposes of college students in Ohio.
Arkansas, eastern, 72-25	28:2281	Arkansas Stats. Anno. Cumulative Supp. Sec. 3-707. Objections to durational residence requirements of 1 year in State and 6 months in county for voting purposes.
New Mexico, 9211	42:1983, 1343	To enjoin enforcement of 6-months' residency requirement for admission to New Mexico State bar and holding same unconstitutional.
Taxes:		
Connecticut, 14821	28:2281	Action brought under 42 U.S.C. 1983 seeking a declaratory judgment that the State of Connecticut, elementary and secondary school financing system violates the equal protection and due process clauses of 14th amendment.
Pennsylvania, eastern, 72-570.	28:1331, 1343 (3)(4), 2281	To restrain collection of Philadelphia wage tax by use of Pennsylvania arrest statutes.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Taxes—Continued		
Florida, southern, 69–746	42:1983, 1343	Failure of nonprofit organization (churches) to pay taxes on profitmaking property unconstitutional.
Illinois, northern, 71–2315	28:2284	Constitution, certain taxing procedures, Illinois Revenue Act.
California, eastern, 1258	28:2281	Challenge to passing of school bonds by majority vote.
Voting election laws:		
District of Columbia, 71–577; D–US.	28:1331, 2201, 2282, 84	To declare Hatch Act unconstitutional.
District of Columbia, 72–509; D–US.	Voting Rights Act	To seek a change in the voting rights due to annexation proceeding in that city. (Petersburg.)
New York, eastern, 71–930	28:2284	Civil rights—Declaratory judgment to prevent deprivation of election law, etc.
New York, eastern, 71–1577	28: 2281, 84	Declaratory judgment to compel New York State to issue absentee ballots in primary election.
New York, southern, 71–3200.		Civil rights—Restrain enforcement of certain provisions of the election law.
New York, southern, 72–1511.	28: 2281, 84	Civil rights—Challenges the constitutionality of certain election laws of the State of New York.
Pennsylvania, eastern 71–2212.	28: 1331, 43; 42: 1971, 83	To declare Pennsylvania Election Code unconstitutional.
Pennsylvania, middle, 72–102.	28: 2281, 84	Complaint to declare Pennsylvania Election Code unconstitutional.
Maryland, 72–141	28: 2281	Suit to declare unconstitutional Maryland election statute.
Maryland, 72–142	28: 2281, 84	Do.
North Carolina, middle, 71–221.	28: 2281	Suit to change boundaries of congressional districts for election purposes. (In 1972 this case was recorded as a civil rights case.)
Virginia, eastern, 71–514	28: 1331, 43, 2281, 1981, 83, 85	Violation of students' rights to register for voting.
Virginia, eastern, 72–58	3.42 1–4.1 Code of Virginia	All congressional elections in Virginia be ordered held pursuant to redistricting. (In 1972 this case was recorded as a civil rights case.)
West Virginia, southern, 71–87.	28:2281	Complaint to have State of West Virginia redistricted as to congressional district; attacking West Virginia Code for disparities in population of congressional Representative districts.
Alabama, northern, 72–197.		Seeks injunctive relief to place plaintiff's name on ballot without payment of assessment fee.
Georgia, northern, 16286	28:2281	Violation of sec. 5 of Voting Rights Act of 1965.
Georgia, northern, 16373; P–US.	28:2284; 42:1973(c)	Sections 5 and 12(d) of the Voting Rights Act of 1965.
Georgia, middle, 768	28:2284, 1343 (3 and 4); 42:1973(c) 1984.	Suit to enjoin enforcement of a statute of State of Georgia arising under equal protection clause of the 14th amendment—Section 5 of Voting Rights Act of 1965.
Mississippi, northern, 7173	28:2281, 84	Class action seeking permanent injunction prohibiting the enforcement of art. 12, sec. 251 of the Mississippi constitution and sec. 3235, Mississippi Code, which prevents qualified electors from exercising their fundamental right to vote in the State 1971 Democratic primary elections and general election unless they registered to vote 4 months before the date of the State general elections.
Texas, northern, 5373	42:1983, 88; 28:1343, 2281, 84	Alleges State house bill No. 5 unconstitutional (that costs of election be assessed among condidates and must be paid for name to be placed on ballot). Seeks declaratory judgment; temporary and permanent injunction.
Texas, southern, 71–1035	28:2284	Violation of civil rights—Exclusion from candidacy, city election 28 U.S.C. Secs. 2201, 1343 and (4).
Michigan, eastern, 37094	28:2281, 84	Constitutional rights—Denied right to participate in selection of delegates to political party of choice.
Ohio, northern, 71–1130	28:2284	Declaratory judgment and civil rights violation (voting reapportionment). (In 1972 this case was recorded as a civil rights case.)
Ohio, southern, 8316	42:1971 et. seq., 28:1331	Attacking State statutes prohibiting 17-year-old person who will be 18 at the time of the general election from voting in primary elections held prior to the general election.
Tennessee, middle, 6576	28:2284	Seeking reapportionment of Tennessee Legislature. (In 1972 this case was recorded as a civil rights case.)
Illinois, northern, 71–2363, 2415.	28:2284	Constitution, certain sections Illinois Election Code.
Illinois, northern, 71–2203	28:2284	Constitution, certain statutes Illinois Election Code.
Illinois, northern, 71–2245, 2395, 1955.	28:2281	Constitution, certain sections, Illinois Election Code.
North Dakota, 1115	28:2281	Infringement of constitutional rights in the manner of selecting delegates to national political conventions under State statutes.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Voting election laws—Continued		
Arizona, 71-89	28:2284	Civil rights—42 U.S.C. 1973(c) and 1983 and 28 U.S.C. 2201. Suit for declaratory and injunctive relief. Action against defendants enforcement statutes of the State of Arizona to deprive citizens of Arizona including the class represented by certain of the plaintiffs of their right to vote.
California, northern, 72-380	42:1971	Re filing fee as to registration of election candidate.
Colorado, 4052	28:2284	Motion for preliminary injunction wherein an elected delegate to State convention sought to serve as delegate to county and State conventions and to declare a statute of Colorado unconstitutional.
New Mexico, 9340	28:1343(3)	To enjoin enforcement of allegedly unconstitutional State statutes prescribing qualifications for voters and to require acceptance of plaintiff's candidacy for U.S. Senators.
Oklahoma, western, 71-656	28:1343(3); 42:1988	Violation of 14th amendment to Constitution of United States—Discrimination against State senators whose offices have been eliminated. Injunction re holding any election, etc.
Utah, 70-192; D-State board of education.	42:1983, 88	Plaintiff's motion for summary judgment and trial for reapportionment of districts for election of members of the board. (In 1972 this case was recorded as a civil rights case.)
Welfare, social security and unemployment benefits:		
District of Columbia, 71-752; D-US.		To compel defendants to provide illegitimate children of servicemen with medical service benefits.
Maine, 12-64	42:1983	Seeking invalidity of a regulation of State of Maine Department of Health and Welfare concerning disability benefits under the aid to the aged blind and disabled (AABD) program, as it relates to disabling nervous disorders.
Massachusetts, 71-2392	28:2281	Unmarried welfare mother, pregnant, seeks funding from welfare department to pay for abortion.
New Hampshire, 3348	28:2281	Restriction of welfare and disability benefits.
Connecticut, 13903 US-D	28:2282	Action for injunction and declaratory judgment that Federal practices under 42 U.S.C. 403a(2) is a violation of constitutional rights under the fourth amendment.
Connecticut, 14926	28:2281	Class action brought under 42 U.S.C. 1983 seeking a declaratory judgment that the Connecticut State Welfare Manual, vol. I, index 352, 352.6 violates the U.S. Constitution and Social Security Act and regulations.
Maryland, 71-853	28: 2281, 84	To contest State regulations—Prohibits dependent-children of persons who are disqualified from receive ing unemployment benefits from receiving welfare benefits.
South Carolina, 71-1231	28: 2281, 84	Challenge State regulations on denial of public welfare benefits to child born out of wedlock when mother refuses to give father's name.
Virginia, eastern, 71-537	42: 1983	Claim for workmen's compensation.
Alabama, middle, 3330	28: 2281	Class action seeking declaratory and injunctive relief from regulation promulgated by State welfare Department in connection with ADC and APTD benefits, alleging violation of 14th amendment rights.
Wisconsin, eastern, 71-539	28: 2282	Challenge to constitutionality of sections of Social Security Act providing for suspension of social security benefits without a hearing (due process).
Wisconsin, western, 69-263	28: 2281	Action to restrain enforcement of Wisconsin statutes relating to aid to families with dependent children.
Iowa, southern, 2386	Vio. 5th and 14th amendment to Constitution, 42 U.S.C., sec. 601, 1396, 1396a, and 1983.	Determination that portion of Iowa Code 239.1 and regulations defendant department 249A.1 re subclassification of dependent or needy children is unconstitutional as denial of equal protection and due process of law as required by 5th and 14th amendments to U.S. Constitution.
New York, northern, 72-134	28:2201, 02	Injunctive relief unemployment payments.
New York, southern, 71-2060.	28:2284	Civil rights—Enjoin enforcement of sec. 131(4) of New York Social Services Law and sec. 385.7 and sec. 385.1(c), T. 18 New York Codes, Rules and Regulations, denying aid to dependent children because enrolled in academic college programs.
New York, southern, 71-2978.	28:2284	Civil rights—To redress termination of benefits and entitlements prior to hearing.
New York, southern, 71-5556.	28:2281, 84	Civil rights—Seeks declaratory and injunctive relief and writ of mandamus to redress denial unemployment insurance benefits under unemployment compensation for Federal employees program without fair hearing.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Welfare, social security and unemployment benefits—Con.		
New York, western, 71–306.	28:2281	Civil rights suit re constitutionality of New York State work rules applicable to recipients of public assistance.
Vermont, 6227	28:2281	That the court declare 21 Vermont Stat. Amdts. secs. 1347, 1348, and 1349 unconstitutional under the 14th amendment, insofar as they authorize the suspension or termination of unemployment compensation benefits without a prior fair hearing.
New Jersey, 71–879	28:1331, 37, 43, 2281, 84	Declare regulations re family assistance unconstitutional.
Pennsylvania, eastern, 70–2411; D-Higher Education Assistance Agency.	28:1343, 2281, 84, 42:1981, 83.	To enjoin denial of assistance.
Nebraska, 71–280	28:2281	Claim of unconstitutionality of reduction of ADC payments.
Nebraska, 1781	28:2281	Declaratory and injunctive relief, welfare appeal procedure be set aside.
Arizona, 70–532	28:2284	Class action for declaratory and injunctive relief to restrain deferments from enforcement of statewide welfare regulations. 14th amendment of the U.S. Constitution and Social Security Act 42 U.S.C. 601–610.
California, northern, 72–298	28:2281, 84	Declaratory relief as to validity of State welfare and institutions code, sec. 14005.6(3) and regulations thereunder.
Oregon, 71–420	28:2281, 84	Type of civil rights matter (welfare).
New Mexico, 8739	42:1983, 1343	To provide plaintiffs assistance under Social Security Act and New Mexico regulations unconstitutional.
New Mexico, 9323	28:1343 (3)(4)	For declaratory and injunctive relief re New Mexico Health and Social Services regulation violating first and 14th amendment.
Constitutionality of State statute—not classified above:		
Connecticut, 14744	28:2281	Class action seeking a declaratory judgment that sec. 122 of Connecticut P.A. No. 5 (June 1971 special session) is invalid and unenforceable under the Constitution of the United States.
New York, southern, 71–3849.	28:2284	Habeas corpus—Seeks to declare unconstitutional chapter 1179 of the Laws of New York of 1971 and preliminary injunction restraining its enforcement.
New York, western, 71–80	28:2281	Civil rights suit re constitutionality of certain sections of New York State general municipal law and public authorities law.
Vermont, 6530	28:2281, 84	That the court declare 23 Vermont Stat. Amdt. §301(a)(1)(d) unconstitutional and permanently enjoin the enforcement of said statute.
North Carolina, 2666	42:1971, 83, 88; 28:1343, 2281, 84.	Constitutionality of North Carolina General Statutes—alleged violation of civil rights.
Georgia, northern, 16089	28:2281	Attacking Georgia Code 67–801 (ff).
Michigan, eastern, 36384	28:3381, 84	Constitutionality of State law.
Oklahoma, northern, 70–322.	28:2281, 88	Injunction to restrain defendents from enforcing . . . sec. 183 of T. 56 of Oklahoma Statutes (1969), etc., on grounds that said statutes are invalid under Constitution of United States.
Oklahoma, western, 71–696	42:1983	Declaratory judgment to declare 74 Oklahoma Stat. 1962, sec. 818 unconstitutional—Injunction, claim re violation of civil rights.
Other:		
District of Columbia, 72–11; D-U.S.	17 U.S.C.; copyright law	Interpretation of Federal statutes.
Massachusetts, 72–558	28:2281	State statute requiring motorcycle riders and passengers to wear helmets.
Connecticut, 14680	28:2281	Action for legal and equitable relief and injunction pursuant tn 42 U.S.C. 1983.
New York, northern, 71–108.	28:2281, 84	Injunctive relief teacher on probation—would not salute flags.
New York, southern, 71–2990.	28:2281, 84	Civil rights—Civil action for declaratory judgment and injunctions against enforcement of New York public health law, art. 44, secs. 4400, 4403, 2808 on grounds of unconstitutionality.
New York, southern, 70–5708.	28:2281, 84	Civil rights—Actinn to restrain the enforcement of certain provisions of the public health law.
Delaware, 3940	28:2284	Hearing on remand from U.S. Supreme Court after appeal of 327 F. Supp. 1349—Action to declare unconstitutional certain statutes and Delaware Superior Court rules permitting entry of judgments by confession on warrant of attorney.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Other—Continued		
Pennsylvania, western, 71-551.	28:2281	Point system under Pennsylvania Motor Vehicle Code. Violation of constitutional rights.
North Carolina, eastern, 1542.	28:2281; 1331; 1343(3) 42: 1983, 1942, 1988.	Constitutionality of North Carolina Gen. Stat. 160-445 annexation of cities.
Alabama, middle, 3394	28:2281	Plaintiff sought for herself and her class declaratory and injunctive relief from Alabama, Dept of Public Safety regulation requiring that drivers' licenses be issued to married women in their married, rather than maiden, names, alleging violation of 14th amendment rights, 42 U.S.C. 1983.
Alabama, middle, 3395	28:2281, 84	Plaintiff challenged constitutionalty of State statute requiring prospective members of bar to take an oath closing "So help me God," alleging violation of 1st and 14th amendment rights.
Alabama, middle, 3176	28:2281, 84	The attorney general of Alabama, and a grocery corporation seek injunctive and declaratory relief from operation of State statutes establishing Alabama Dairy Commission and giving said commission authority to fix prices of dairy products. Violation of due process and equal protection clauses of 14th amendment alleged.
Florida, middle, 72-345	42:1983	Violation of civil rights.
Florida, southern, 72-258	28:1343(3), 2281, 32, 83, 84, 42:1981, 83, 88.	Florida, Stat. 286.011, public meetings and records "sunshine law," invalid and unconstitutional.
Georgia, northern, 15346	28:2281, 2284	Attacks Georgia, Code Ann. sec. 99-2912(b) (seeking injunction to halt defendant from collecting overpayment).
Texas, western 68-175	28:1331; 42:1983, 88; 28:1343	That article 3 of the Texas Constitution and article 2806, Texas Civil Statutes be declared unconstitutional insofar as they interfere with a system for providing equal education and for Court to enjoin defendants from depriving complainants of an equal education.
Texas, western 70-304	28: 1331, 1343 42:1983	Civil rights—Judgment or decree asked declaring article 5154c of Vernon's statutes (Tex.) is void—due process and equal protection clauses of the 14th amendment. Injunction asked against defendant from enforcing—particularly in the Assoc. De Obreros Mexico-Americanos.
Tennessee, middle 6367	28:2281, 84	Seeking to have Tennessee Drug Control Act of 1971 declared unconstitutional.
Indiana, northern 72-31	42:1983	Enjoin defendants from enforcing Public Law 93 (step-children).
Wisconsin, eastern 71-316, 17, 30, 31, 35,52.	28:2281	71-C-316, 317, 330, 331, 332, 333, 334, 333, 335 and 353 are all companion cases consolidated for hearing on motions of State of Wisconsin for summary judgment. They involve a challenge to constitutionality of Wisconsin statutes as construed by Wisconsin Supreme Court permitting cities to refuse liquor licenses without a hearing (due process).
Arkansas, esatern, 71-26	28:2281	Class action under 14th amendment questioning constitutionality Arkansas. Act 41 of 1941 re rural improvement districts claiming it violates equal protection clause of 14th amendment.
Iowa, southern, 8-2188	28:2281, 84, 1343	Determination of constitutionality of secs. 229.1, 229.2 and 229.40 of the Iowa Code seek to determine that procedure of commitment of mentally ill persons in in the State of Iowa is unconstitutional.
Minnesota, 71-14	28:2281	Civil rights. Declaratory judgment to declare Minnesota Statutes, chapter 565 unconstitutional referred to as the claim and delivery statute.
Minnesota, 71-314	28:2281	Civil rights. Declaratory judgment to declare Minnesota Statute, secs. 197.45 through 197.47 unconstitutional referred to as the Minnesota veterans preference law.
Colorado, 2275	42:1983	Action to declare that Colorado Revised Statutes secs. 94-1-45 and 94-2-14 are unconstitutional insofar as they purport to authorize, require, and grant immunity for acts of Colorado National Guardsmen.
Colorado, 3260	28:2281, 84	Action seeks injunction against State officials for enforcing provisions of Colorado Motor Vehicle Act, pursuant to operator license suspensions
Colorado, 4009	28:2281, 83	Temporary restraining order seeking to implement at once any interim and temporary rate increases to be collected subject to refund with legal interest.
New Mexico, 9296	28:1343	To enjoin enforcement of State replevin statute and declare same unconstitutional.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
FISCAL YEAR 1973		
Abortion laws:		
Connecticut, 5-521	42:1983; 28:1343 (3) (4); 28: 2281, 84; U.S. Constitution 1, 4, 5, 8, 9, 13, and 14.	Application to declare Public Act No. 1, Connecticut General Assembly (an act concerning abortion unconstitutional.
Connecticut, 14291	28:2281, 84	Action brought by women pursuant to 42 U.S.C. 1983, seeking declaratory and injunctive relief, claiming denial of constitutional rights re the application to them of the Connecticut abortion law.
Pennslyvania, eastern, 70-2527.	28:2281, 84	Suit to declare Pennsylvania abortion laws unconstitutional.
Assistance to nonpublic schools:		
New Jersey, 72-1107	28:1331, 43(3)	Declare State statute providing funds to parochial schools unconstitutional.
Pennsylvania, eastern, 71-2223,	28:2281, 84	To declare the Pennsylvania Parent Reimbursement Act for nonpublic schools unconstitutional.
Pennsylvania, eastern, 73-269.	28:2281, 83	Suit to declare unconstitutional certain acts of State of Pennslyvania re payment for purchase of textbooks and other benefits for use by nonpublic schools.
Education for handicapped Colorado, 4620.	28:1343(3); 42:1983, 81; 28: 2281, 84.	Action for preliminary and permanent injunctive relief—To prevent the denial to physically disabled and handicapped their equal right to education.
Employment:		
District of Columbia, 73-570.	28:1331, 61; 2201, 02, and 5:702.	To enjoin defendant from terminating employment without a hearing—To declare his suspension unlawful.
Delaware, 4542	42:1983	To enjoin enforcement of Delaware merit system rule 15.0621. This case is stayed pending decision of Supreme Court of Delaware in a companion action.
Ohio, northern, 1-72-532	28:2281, 1331, 1343	The question of increase in compensation for municipal judges.
Ohio, southern, 1-7530	28:1343, 2281	To require due process in a dismissal proceeding before the City Civil Service Commission. (Note: 2d hearing.)
Illinois, western, 3-71-47	28:2281	Violation of civil rights under certain provisions of retirement and pension plan for circuit court judge in the State of Illinois.
Alaska, 3-72-96	32:709	Constitutional right to employment.—Declare Federal statute unconstitutional.
California, southern, 72-218.	28:2282	Permanent injunction.—Claims of unequal and discriminatory treatment arising from enforcement of mandatory discharge requirements of section 6382, title 10.
Washington, western, 72-799.	28:2282	Federal nonprobationary employee seeks to enjoin his discharge without first being afforded a formal hearing alleges T. 5 sec. 7501 as applied to him violates fifth amendment to Constitution.
Expelling students: North Carolina, middle, 6-72-138.	28:2281	To enjoin schools from expelling students without hearing and without providing special classes for expelled students.
North Carolina, western, 3-72-72.	28:2281	Exclusion, expulsion, or dismissal of student from public school.
Arkansas, eastern, 4-73-37	42:1983	Prohibition of plaintiff in attending public schools after fighting, etc.
Housing:		
South Carolina, 3-72-1477	28:2284	Unconstitutionality of State statute on distress for rent.
Louisiana, eastern, 72-3195	28:1343 (3) and (4), 28:2281, 84.	Eviction of tenants, under color of State law, in retaliation for reporting housing code violation.
Ohio, northern, 1-71-251, 72-67.	42:1415(7)(b)	Enforcement of low rent housing.
Obscenity:		
New Jersey, 2-72-911	28 1343, 2281, 84; 42:1983	Declare State obscenity statute unconsittutional.
New Jersey, 73-49, 50, 51	28:1331, 43, 2281, 84; 42:1983	Declare State lewdness statute unconstitutional, also State regulations.
New Jersey, 2-73-472, 496, 585.	28:1343, 2281, 84; 42:1983	Declare State obscenity statute unconstitutional.
Ohio, northern, 1-73-190	42:1983, 1331, 1343	Enjoin defendents from unlawful saizures of motion picture film pursuing State prosecutions.
Ohio, northern, 1-73-193	42:1983	Restrain and enjoin prosecution and harassment of motion picture theater owner and operator and for damages and other relief.
Ohio, northern, 3-72-193	28:1331, 1343, 2281, 84	Hearing—Preliminary injunction deprivation of civil rights: Sale of obsecne publications.
Ohio, northern, 3-72-432	42:1983	Hearing—Motion to dissolve temporary restraining order. Deprivation of civil rights: Obscene movies.
Wisconsin, eastern, 72-121, 73-27, 170, 183.	22:2281	Challenge to constitutionality of Wisconsin criminal statute re obscenity.
Arizona, 2-1-72-512	28:1331, 32(1), 1343(3), 2281	Suit for injunctive and declaratory relief re defendant's conduct in suppressing exhibition of moving picture; violating fundamental rights under the Constitution and Civil Rights Act.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Obscenity—Continued		
California, southern, 72-240.	28:2282	Injunction—Declaratory and injunctive relief from the use of seized alleged obscene material in connection with State prosecution.
Kansas, 5-5267	28:1343(3) (4)	Suit to restrain defendants from arresting plaintiffs for selling obscene material.
Kansas, 6-4859	28:1343 (3) (4), 42:1983, 85, 28:1331(a), 2281, 84.	Civil rights—Suit to restrain from enforcing State statute regarding motion picture entertainment and for declaratory judgment.
Penal codes and prisoner petitions:		
Rhode Island, 4940	28:2281	Injunction and damages re State statutes authorizing detention without arrest.
Connecticut, 14851	28:2281, 84	Action brought to 42 U.S.C. 1983 and 1985m seeking relief and adjudication from alleged unconstitutional State escape statute.
Connecticut, 15238	22:2281, 84	Action brought by State prisoners pursuant to 42 United States Code secs. 1983 and 1985, seeking declaratory and injunctive relief and damages re "good behavior time" credit.
New Jersey 3-71-1883	28:1343	Review alleged punitive transfer of prisoner.
New Jersey, 3-72-1392	28:1343(2), 2281, 84	Declare State statute re forfeiture of prisoner good time credits unconstitutional.
North Carolina, middle 3-72-148.	28:2281	Seeking relief against enforcement of North Carolina statutes depriving convicted felons of the right to vote.
Alabama, middle 2-3754	28:2281	Class (persons committee to State penal institutions as criminal sexual psycopaths) action seeking injunctive and declaratory relief from Alabama criminal sexual psychopath statute, alleged unconstitutionality under eighth and 14th amendments.
Georgia, northern, 1-16901	28:2282, 84	Federal prisoner seeks to enjoin the inforcement of a repealed Federal statute on the ground of constitutional invalidity.
Ohio, southern, 2-71-188	28:2281	Attack on Ohio statute that precludes granting credit agains a sentence for pretrail confinement.
South Dakota, 5-72-5033	28:2281, 84	To declare a provision of the statutes of South Dakota as unconstitutional, that is, "to deprive a child of his liberty for up to 3 months without a hearing."
Washington, western 9725	28:2281	Paroled felon seeks right to vote; State statute prohibits unless civil rights are restored.
Prejudgment attachments, seizure of property without notice:		
Maine, 13-117	42:1983, 28:2201, 02, 28:1343(3), 28:2281, 84.	Action challenging constitutionality of Maine law which permits prejudgment attachment of real estate, etc. and violating due process clause of the 14th amendment.
Massachusetts, 73-675	28:2284, 81	Seeks to extend the rule invalidating prejudgment attachments without notice of hearing. 2 General Laws ch. 214.
Massachusetts, 72-2516-3363	28:2281	Prejudgment of real estate without prior notice.
Massachusetts, 72-2178, 3640.	28:2281	Attachment of real estate under Massachusetts General Laws ch. 223, secs. 42 and 62-70 without prior notice.
Massachusetts, 72-3230	28:2282	Prejudgment attachment of automobile without notice of warrant.
New Hampshire, 73-21	28:281	Money attachment without notice.
Vermont, 5-6451, 6762	19:1618, 1459, 1460	U.S. Customs—Mitigated seizure, etc., without a hearing, allegedly violated plaintiff's rights.
Louisiana, eastern 71-1813	28:1343, 1331, 32, 2281, 2284	Seizure and sale of property without notice to debtor under provisions of Louisiana executory law.
Tennessee, western, 2-72-380.	28:2281, 84	Declaratory judgment, injunction, and damages for taking of property without a prior hearing.
New Mexico, 1-9871	42:1983, 28:1343	Class action, civil rights—Injunctive and declaratory relief, enjoin enforcement of prejudgment statute.
Residency requirements:		
District of Columbia, 72-175.	22:910, 22:CFR 11.2, and 501.6(b).	To enjoin defendants from enforcing the durational citizenship required under this act. Temporary restraining order.
New Hampshire, 72-182	28:2281	Residency requirements for elective office.
Rhode Island, 5117	28:2281	Injunction re State statute requiring 2-year residence for divorce.
Connecticut, 15113	28:2281, 84	Action brought pursuant to 42 U.S.C. sec. 1983, seeking to declare invalid sec. 46-15 Connecticut General Statute (1-year duration residency re divorce action).
Connecticut, 14824	28:2281, 84	Action brought pursuant to 42 U.S.C. sec. 1983 and 28 U.S.C. secs. 2201, 2202, seeking a declaratory judgment and injunction against refusing or failure to grant student loans because of residency.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Residency requirements—Con.		
Connecticut, 15515	28:2281	Action brought pursuant to 42 U.S.C. secs. 1981 and 1983, seeking declaratory and injunctive relief. Seeks to enjoin enforcement of Connecticut General Statute secs. 5–219 (requiring U.S. citizenship for classified employment).
Connecticut, 5–259	42:1983, 28:1343	Federal question. Seeks injunction against State court judges refusing to allow out of State attorney to appear for plaintiffs in State court action.
New York, eastern 72–1120	28:1343	Freedom of movement New York State scholarship winner—Claimed award should have been honored outside New York State.
Virginia, eastern 3–710–700, 72–43.	28:2284	Declaratory judgment sought—Attacking constitutionality of Virginia residence requirements for lawyers.
West Virginia, southern, 2–72–145.	28:2281	For declaratory judgment and injunctive relief—to declare West Virginia Code, ch. 30, art. 2, sec. 1, unconstitutional; action brought about by board of law examiners refusing to give examination to practice before 1-year residency rule requirement.
Florida, southern 1–72–1203.	28:1343, 42:1983, 85, 86	Aged denied medicare solely on account of alienage and failure to reside in United States for 5 years, in violation of Constitution.
Texas, eastern, 1–7784	Sec. 54.052(d) and sec. 54.052(e) of Education Code of Texas; violation of 14th amendment to Constitution of United States.	To restrain defendants from classifying plaintiff and class she represents as nonresident students for tuition purposes; declaratory judgment against education code of State of Texas. (Closed Apr. 26, 1973.)
Michigan, western, 1–71–166.	28:1343(3), 42:1983	To declare Michigan statutes invalid which deny benefits to veterans who have lived in Michigan for 5 years.
Missouri, western, 2–1825	28:2284	Challenge of constitutionality provisions and statutes of Missouri prescribing the prior length of residence as a qualification for voter registration and right to vote in general primary and other elections.
Arizona, 4–71–154, 161	42:1981, 83, 2000(c and d) 2281, 2284.	Termination/denial of employment of permanent resident alien by State of Arizona because of noncitizen status.
California, northern, 3–72–0298.		Denial of State public assistance based on citizenship or residency.
Hawaii, 1–72–3588	28:2284	Residency requirement for divorce proceedings.
Hawaii, 1–73–3729	28:2281, 84	Citizenship requirement to acquire State civil service jobs.
Hawaii, 1–72–3719	28:2284	Nonresident tuition differential.
Montana, 9–2285	28:1343(3)	Claims denial of access to Montana divorce courts under Montana law governing residency requirement of 1 full year unconstitutional and infringement of rights.
Nevada, 2–1853	28:2284	Plaintiff challenges State's 6-month residency requirement for applicants desiring to take the Nevada State bar examination.
Washington, western, 2–72–614.	28:2281, 2284	Nonresident university students challenge State statute requiring higher tuition until they reside here 1 year.
New Mexico, 1–9940	28:1343	To enjoin enforcement statute of New Mexico re residency requirement for divorce.
New Mexico, 9515	28:1343; 42:1983	Civil rights, class action, to enjoin larger fee for out-of-State students (nonresident).
New Mexico, 1–8314	42:1983, 88; 5:5517	Statute withholding New Mexico income tax from nonresident employees.
Sobriety tests:		
Arizona, 2–73–163	C.R. Act of 1871 (42:1983)	Complaint under Civil Rights Act of 1871 to enjoin as unconstitutional an enforcement of sec. 28–691, Arizona Revised Statutes which require the Motor Vehicle Division of Arizona Highway Department to suspend driving license of citizens suspected of driving while intoxicated who refuse a breath test while under detention.
Kansas, 6–4990	28:1983, 1343(3)(4)	Civil rights—Suit to restrain from enforcing State statute regarding suspension of driving privileges without prior hearing. Suit for declaratory judgment. Plaintiff not advised of consequences of not submitting to a sobriety test.
Taxes:		
Pennsylvania, eastern, 72–1115.	28:2281	Civil rights class action to declare the Pennsylvania Municipal Claims Act as it permits municipalities to place liens upon properties for such items as street paving, etc., unconstitutional.
Arkansas, eastern, 1–72–3	42:1983	Collection and disbursements of taxes used in maintaining school districts.
Arkansas, western 3–72–7	28:1343, 1331	To set aside tax levy for building of public school.
Voting and election law:		
District of Columbia, 70–3340.	42:1983, Public Law 91–405, 84:848.	Restrain defendants from enforcing this act.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Voting and election law—Con.		
District of Columbia, 72–1967	D.C. Delegate Act, D.C. Election Act, Hatch Act.	Restrain the operation and execution of certain acts to Congress.
District of Columbia, 72–509.	79 Stat. 438, 439, 42:1973 b and c.	Annexation of surrounding area does not violate the Voting Rights Act of 1965.
District of Columbia, 72–1718.	Sec. 5, Voting Rights Act of 1965.	Annexation of land and consolidation of political subdivision.
New York, eastern, 72-1088	28:1343	Civil rights in voter registration processes.
Vermont, 3-6705	28:2201, 02, 1343(3), 42:1983	Restrain enforcement of 90-day voter registration in State of Vermont.
Pennsylvania, eastern, 72–1473.	28:2281, 82, 84	To declare the Communist Control Act of 1954 and the Pennsylvania statute unconstitutional (and specifically as to placing candidates for election on the ballots).
Pennsylvania, eastern, 71–979.	28:2281	Class action to declare unconstitutional certain Pennsylvania statutes and procedures as to voting (the 2-year purge statute, et al.).
New Jersey, 1–72–891	28:1343, 2281, 84, 42:1971, 73	Declare State voter registration statute unconstitutional.
South Carolina, 2–72–1225, 3–72–1256.	28:2281	State statute unconstitutional as to refusing to certify candidates by petition. Failure to grant these persons leave to appear on election ballots.
Virginia, eastern, 3–71–695	28:2284, 42:1973(c)	Suit seeking injunctive relief from annexation by city of Richmond of portions of Chesterfield County in that this annexation has allegedly diluted the vote of the affected Negro population, in violation of 42 U.S.C. 1973(c).
Virginia, western, 7–42–145	28:1331	Alleged deprivation of constitutional right (5th and 14th amendments) to seek election to and from voting for local government while adjudicated as residents.
Alabama, northern, 72–713	42: 1973 aa-1, 1972 (Supp.)	Procedures regarding absentee voting.
Florida, middle, 3–72–218	28:1343(3), 2281, 2284, 42: 1983	Right to campaign for State office.
Florida, northern, 4–1861, 67.	42:1983	Violation of constitutional rights by State statute, sec. 99.153, Florida Statutes by denial of a place on the general election ballot.
Florida, southern, 1–72–735	42:1983, 28:1343, 2281, 2284	Florida Statute 103.021(3) Requiring pyament of 10 cents per name for certification of petitions for President and Vice President unconstitutional.
Georgia, northern, 1–17179	28:2281, 84	Action to enjoin the enforcement of title 34, secs. 602 and 611 of Election Laws and Voting Rights Acts of 1965 and 1970.
Georgia, middle, 5–2795, 2825	42:1973, 14th and 15th amendments, 28:2281.	Suit for declaratory judgment and injunction re Georgia, Laws, 1971, p. 3564 violating Voting Rights Act of 1965, declaring election invalid and requiring new election for Board of Commissioners Twiggs County suit for declaratory judgment and injunction re Georgia Acts 1971, No. 649, violating Voting Rights Act of 1965, to eliminate unlawful implementation of Act No. 649.
Georgia, southern, 4–2882	42:1973(c)	Complaint for preliminary injunction for full post-election relief, including the setting aside of the invalid election and ordering new election.
Louisiana, eastern, 72–1868	28:1343, 42:1983, 85	Denial of the right of civil service employees to seek political and nonpolitical public offices.
Louisiana, eastern, 72–2813	42:1971, 1981, 83, Civil Rights Act.	Denial by State officials of plaintiff's right to have his name placed on election ballot as independent candidate for judge, Criminal District Court for Parish of Orleans.
Texas, northern, 4–1975	2281–84	Plaintiffs claim discrimination on voting in bond election which violates constitutional rights.
Texas, northern, 2–1172	28:2281, 84	Suit to have declared unconstitutional State laws requiring separate party primaries and ballots and requiring persons to join a political party in order to vote in primary elections.
Texas, northern, 2–1222	28:2201	Seeks to restrain enforcement of article 55c Texas revised civil statutes denying persons the right to vote in referendum election.
Texas, eastern, 1–7925	V.A.T.S. election code, article 13 12a(2); 28 U.S.C. sec. 2281, 2284, 2201, and 1343 (3).	To refrain section of State and county clerk of Jefferson County, Tex. from preparation of ballots for election; and to require court to order that plaintiff's name be placed on ballot as nominee of Republican Party. (Closed Oct. 17, 1972).
Indiana, northern, 2–72–224, 230, 243.	28:1331, 1343	Complaint to restrain defendants from enforcing, executing or implementing Indiana Statute S29–3812. (Statute compels an existing or newly organized political party to have its officers file an unconstitutional affidavit with the Indiana State Election Board in order for such party to have its candidates' names appear on the ballot for any election.)

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES, SHOWING THE SUBSTANTIV NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Voting and election law—Con.		
Michigan, eastern, 2-38592	28:2281, 84	Civil rights—Complaint against Michigan director of elections challenging the nominating procedure for election of Michigan Supreme Court Justices (Michigan Constitution, art. 6, sec. 2).
Arizona, 2-72-403	28:2282, 84	Class action complaint for interlocutory injunction restraining defendants from prohibiting plaintiff from participating in political affairs and presidential campaign while plaintiff is member of Air Force.
Arizona, 2-72-481	42:1983, 28:1843, 2281, 2284	Suit for declaratory judgment and injunction restraining defendants from closing registration of electors earlier than 30 days prior to next general election to be held Nov. 7, 1972, and from enforcing 50-day State residency requirement.
Utah, 2-72-130	28:2201, 02	Plaintiffs ask court for declaratory and injunctive relief on the grounds that the Utah law, insofar as it requires 10 signatures of registered voters from each of 10 counties, is unconstitutional as a violation of the equal protection clause of the 14th amendment.
Welfare, social security and unemployment benefits:		
New Hampshire, 72-160	28:2281	Eligibility for unemployment compensation.
Rhode Island, 5038, 5043	28:2281, RIGL 28-44-6(c) 41-5(c).	Injunction re sex discrimination re applications for State unemployment benefits and temporary disability benefits.
Connecticut, 15104	28:2281, 84	Action brought pursuant to 42 U.S.C. 1983, seeking injunctive relief and declaratory judgment that secs. 241 and 243 of ch. 31 of Connecticut General statutes are unconstitutional, re termination of unemployment compensation benefits without hearing.
Connecticut, 15343	28:2281	Action brought pursuant to 42 U.S.C. sec. 1983, by a claimant under the Connecticut Unemployment Compensation Act who was denied dependency benefits for a ward. Seeks declaratory and injunctive relief.
Pennsylvania, eastern, 71-2965i	28:2281, 84	Class action to declare the Pennsylvania Workman's Compensation Act and accepted statewide practices developed thereunder unconstitutional, and to restrain suspension, etc., of benefits without evidentiary hearing, etci
Virginia, eastern, 3-71-537	28:2281, 84	Suit to challenge constitutionality of a State regulation that permitted temporary suspension of workmen's compensation payments without prior hearing.
California, northern, 3-72-1402, 72-1547.	42:1983	Civil rights. Unemployment benefits.
District of Columbia, 72-1412.	7:2014(b), and 7 CFR, 2173(a)	Challenges "tax dependent" amendment to Food Stamp Act.
District of Columbia, 72-1659.	Public Law 91:285, 84 Stat. 315.	Challenges the no-security benefits to illegitimate children of fathers over 65.
Massachusetts, 72-1557	28:2281	Seeks invalidation of unwritten policy and practice of Massachusetts Welfare Department which reduces or terminates welfare assistance to certain AFDC families.
Connecticut, 15068	28:2281	Action brought pursuant to 42 U.S.C. sec. 1983, seeking declaratory and injunctive relief re denial of assistance by defendant.
New York, northern, 72-163	28:1343 (3) (4), 1331	Constitutional rights under Social Security Act.
New Jersey, 2-72-345	28:2282, 84	Declare statute denying benefits to illegitimate children unconstitutional.
New Jersey, 3-73-268	28:1331, 2282, 2284	To declare 42 U.S.C. 402(g) unconstitutional as it excludes widowed males assistance.
Pennsylvania, western, 72-714.	28:2281, 84, 42:1983, 28:2201, 02.	Violation of constitutional rights—Welfare benefits.
Pennsylvania, western, 2-73-88.	42:1983, 28:2281, 84	Do.
Maryland, 72-271	28:2282, 84	Action to declare invalid a provision in the Social Security Act that arbitrarily discriminates against illegitimate children since it established different standards of eligibility for illegitimate children as distinguished from legitimate children.
South Carolina, 3-71-1231	28:2281, 84	Constitutionality of South Carolina public welfare denying benefits to illegitimate children.
South Carolina, 2-71-1212	28:2281, 84	State regulations that prohibit AFDC assistance for a period of 30 days after granting same.
West Virginia, northern 2-70-101.	28:1343 (3) (4), 42:1983, 28:1331, 28:2281, 84.	Class actions seeking preliminary permanent injunction to enjoin defendant from denying public assistance to plaintiffs and to plaintiff's needy and dependent children and to all others similarly situated.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Welfare, social security and unemployment benefits—Con.		
Alabama, middle, 2-3776	28: 2281	Class action on behalf of persons denied food stamps under common living quarters and tax dependent regulations of Alabama food stamp handbook, seeking injunctive and declaratory relief, alleging unconstitutionality under 14th amendment.
Florida, middle, 3-72-641	28:1343, 2281, 2284, 42:1983	Violation of civil rights—Withholding of welfare money
Georgia, northern, 1-17159 and 17237.	28:2281, 84	Action to enjoin enforcement of Georgia's Manual of Public Welfare Administration (Violation of Social Security Act of 1935 as amended).
Tennessee, middle, 3-6779	42:1983	Seeking to secure rights of Social Security Act.
California, northern, 3-71-2286.		Civil rights—Public assistance terminated without evidentiary hearing.
Washington, western, 2-71-261.	28:2281, 84	State welfare regulations; enjoin termination of grants without pretermination notice and fair hearing on proposed termination.
Colorado, 4267	28:1331, 32, 1343(3)(4), 1361, 5:703-705, 7:2011-2025.	Class action for injunctive relief, to enjoin the operation of certain State food stamp regulations which are unconstitutionally applied against immigrant workers.
New Mexico, 1-9323	28:1343(3)(4)	For declaratory and injunctive relief re New Mexico health and social services regulations violating first and 14th amendments
Constitutionality of State and city statutes:		
Connecticut, 5-593	42:1983, 42:3216, art. 1, sec. 10, U.S. Const. and A. 14.	Action to have Connecticut attachment statute declared unconstitutional and for injunctive monetary relief.
Connecticut, 5-607	28:2281, 84, 42:1983, 28:1331, 43.	Application to declare Connecticut General Statute 17-83e and 17-83f invalid and unconstitutional and to enjoin enforcement of same.
Delaware, 4483	42:1983, 28:1843, 2201	Declare unconstitutional sec. 3, art. II of Delaware constitution. Decision 352 F. Supp. 85.
Delaware, 4460	42:1983	Declare unconstitutional House substitute 1 for House bill 676 as amended passed 7-1-72 by Delaware General Assembly. Decision 352 F. Supp. 444.
Florida, southern, 1-72-1312.	28:1331, 1336, 42:405(g)	Florida Statute 37.03—Suit to declare unconstitutional and have enforcement enjoined. Damages for alleged infringement of civil rights pursuant to 42 U.S.C. 1983 1985, 1986.
Michigan, eastern, 2-37444	42:1983	Relief is sought against the enforcement of a statute of the State of Michigan as applied is violative of the Constitution of the United States MSA 28.204 (C.L. 48, 750.14).
Michigan, eastern, 2-38775, 38861.	28:2281, 84	Civil rights. Challenges constitutionality of Michigan law, to with, the Michigan constitution of 1963, art. 6 sec. 2. Requested declaratory and injunctive relief against local officials.
Ohio, northern, 1-72-570	28:1331, 32, 1343(3)(4), 42:-1983.	Action to declare State statute and city ordinance unconstitutional.
Constitutionality of a states statute:		
Arkansas, eastern 5-73-68	28: 1343(3)(4) 42: 1983, 81	To declare city law unconstitutional.
Iowa, southern 2-72-179	42:1983, 28:1343	Seek interlocutory or preliminary injunction and judgment that sec. 726.3 and 726.1 of 1971 Code of Iowa unconstitution and violates title 42 USCA sec. 1983 and 14th amendment to Constitution.
Iowa, southern 1-72-240	28:1343, 42;1983	Seek invalidation of provisions, chapter 48 and 49 I wa Code 1971.
Montana, 6-2284	42:1973	Claims new proposed constitution for State of Montana was adopted in violation of U.S. Constitution.
Other:		
District of Columbia, 72-1941.	42:1983, 28:1843-2282, 2284 and 2201.	To be permitted to hold prayer services within 500 feet of Soviet Embassy.
Puerto Rico, 3-72-137	28:2281	Civil rights matter, declaratory judgment and injunction.
Connectitut, 15150	28:2281	Action brought pursuant to 42 U.S.C. sec. 1981, seeking declaratory and injunctive relief re discrimination as to membership of noncaucasions in defendant's order.
Connecticut, 15579	28:2281	Action brought pursuant to 42 U.S.C. sec 1983, seeking injunction and declaratory judgment that sed. 52-440b Connecticut General Statutes (compelling disclosure of putative father of child born out of wedlock) unconstitutional.
Connecticut, 15584	28:2281	Action brought pursuant to 42 U.S.C. sec. 1983 an injunction and a declaratory judgment that secs. 2-45, Connecticut General Statutes imposing $35 fee on lobbyists is unconstitutional and to enjoin prosecution.
New York, southern, 72-1228.	28:2282, 84	To redress past, present, and future deprivations of plaintiff's rights, immunities secured by the Court.

CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION—Continued

Substantive nature of civil rights case and district and docket number of civil cases	Citations under which civil rights case was opened	Statement as to the nature of the action
Other—Continued		
New York, southern, 70–5179.	42:1983	To protect the civil rights of the plaintiff in accordance with the Constitution of the United States.
New York, southern, 73–264.	28:2281	To vindicate the federally secured rights of plaintiff to due process of law.
New York, southern, 73–1303.	28:1343	Civil rights—To enjoin certain reporting provisions of the New York Controlled Substances Act, Public Health Law 3300, et seq. re for whom schedule (2) drugs were prescribed.
Vermont, 5–6758	28:1331, 1343 (3) and (4), 42:1981, 1983.	Seeks to have auto license reinstated.
Pennsylvania, eastern, 72–1816.	28:2201	Class action suit to declare unconstitutional the Pennsylvania statute which denies to persons aged 18, 19, and 20 (as well as minors) access to alcoholic beverages.
Maryland, 71–1291	28:2281, 84	Action to enjoin the enforcement of State law, both statutory and case law, that grants allegedly favorable status to women in divorce, custody, and support actions.
North Carolina, western 3–3011.	28:2281	Civil rights—NCGS 75A(a), boarding vessels without duly issued search warrants.
North Carolina, Western, 3–72–0017.	28:2281	Civil rights—NCGS 7A–277 et seq., taking custody of child.
Virginia, western, 7–72–67	28:2281, 84	Alleged violation of constitutional rights—Alleged denial of right to appeal due to poverty (State court).
West Virginia, southern, 2–69–232.	28:2281	For declaratory judgment and injunctive relief—To declare West Virginia Code, ch. 50, art. 15, sec. 2 unconstitutional; action brought about by JP judgment; allege denies access to an appeal to those financially unable to post bond with surety (money owing on contract).
Alabama, middle, 2–3829, 2–3923, 3–938.	28:2281, 84	Class action on behalf of low-income persons seeking injunctive and declaratory relief from Alabama detinue statutes, alleging unconstitutionality under 14th amendment and violations of 42 U.S.C. 1983.
Florida, middle, 3–73–57 and 53C–1–72–2064.	28:1383, 42:1983	Violation of civil rights financial responsibility law—Insurance.
Georgia, middle	15:1, 2, 42:1983, 14th amendment, 28: 2281.	Suit for declaratory judgment and for permanent injunction restraining plaintiffs from prohibiting operation of self-service service stations in Macon Ga.
Michigan, western, 4–72–133.	28:1343(3)(4), 42:1983	Denial of freedom of press.
Iowa, southern, 1–72–275	15:717, R. 57 FRCP, Natural Gas Act.	Seek declaration that amendment to ch. 490, Iowa Code secs. 490.5, 490.6, and 490.13 is in violation of commerce clause, due process clause, and supremacy clause of U.S. Constitution.
Minnesota, 4–71–151	28:1343(3) and (4), 42:1983–1988.	Civil rights.

Source: Administrative Office of the U.S. Courts, Division of Information Systems, Washington, D.C.

STANFORD LAW SCHOOL,
Stanford, Calif., December 13, 1973.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and Administration of Justice, House Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: I am told that S. 271, which would generally abolish three-judge federal district courts, is now before your subcommittee. Although the bill has the laudable objectives of reducing the workload of the Supreme Court and of the lower federal courts, it will have a seriously detrimental effect upon the enforcement of federal civil rights, and I doubt that its contribution to the workload problem will be as substantial as its sponsors hope. Accordingly, I urge that the House not pass the bill, or alternatively, that the House exempt civil-rights cases (that is, cases wherein jurisdiction is based wholly or in part upon 28 U.S.C. § 1343) from the operation of the bill.

I have handled numerous civil-rights cases of various sorts—school-desegregation cases, voting cases, jury-discrimination cases, public-accommodations cases, cases involving the use of state criminal statutes to harass civil-rights workers,

cases involving discriminatory or unfair denials of public services to black citizens—during the past ten years, primarily in the South. In my experience, the three-judge federal district court has been, and continues to be, an indispensable instrument to assure the vindication of federal law in these cases.

We must realistically appreciate, I think, that most civil-rights controversies that require resort to injunctive lawsuits seeking an invalidation of state statutes or administrative regulations (that is, the only civil-rights cases now requiring a three-judge federal district court) arise against a background of significant local hostility to the claims asserted by the civil-rights plaintiffs. The defendants are almost invariably state or local agencies or officials who, with the strong support of local popular sentiment, have rejected the plaintiffs' claims or persisted over their objections in treating them in a way that the plaintiffs assert is federally unconstitutional. Under these circumstances, it is not accidental—it is inevitable in the very nature of these cases—that the plaintiffs find themselves confronted by a solid phalanx of opposition on the part of the local social and political power structure. I am not talking about the local ax-handle crowd. Let us assume—perhaps too optimistically—that the days of the pickax and the cattle-prod are now gone by. The opponents of federal civil rights today are likely to be more powerful precisely because they are more self-righteous and respectable. They are the local civic leaders and officials who feel that civil rights have "gone too far," that black folks have now "got everything that is coming to them," and that new civil-rights aspirations—twenty years after *Brown* v. *Board of Education*—are uncivil, UnAmerican and grabby.

We must also appreciate that the federal district judges—particularly those outside metropolitan centers—live their lives in the milieu in which these attitudes are dominant. Their friends, acquaintances, club-mates, social associates are all a part of the local social stratum that is represented by, and supportive of, the official defendants in the ordinary civil-rights lawsuit. Under the circumstances, it would be unnatural—it would be superhuman—if the force of local sentiment were not reflected to some extent in the attitudes and reactions of the local federal district judges to the cases that come before them. To say, as I am quick to say, that *some* federal district judges have long and consistently managed to hold the balance true notwithstanding these local pressures, is an enormous tribute to them. It is not, however, an accurate description of how most federal district judges can humanly be expected to behave most of the time. However much integrity, strength and good-will they may have, they are—like all of us—affected by their environment in a host of unconscious and half-conscious ways.

Statutory three-judge district courts are considerably more resistant to these local influences than any single district judge can be, for several reasons. First, the three-judge court includes a circuit judge whose impact on the panel is often greater than the one vote he casts. Second, the very fact that the court *is* a panel requires an articulated and considered decision-making process that tends to depress the effect of the inarticulable local pressures. Third, the local district judge can share responsibility for decision with two other judges; he need not face local society as the sole party responsible for a locally unpopular decision.

It will not do, I think, to say that the possibility of appeal to a court of appeals suffices to correct the impact of local pressures on the single district judges. As any lawyer who has tried civil-rights cases knows, most of what the trial judge does that is important is also essentially unreviewable. The days of the facially unconstitutional state statute went out even before the days of the pickax handle. Today, constitutional attacks on state statutes depend on facts—facts regarding the application of the statute, its operation, its effects. These facts, once found at the trial level, are reviewable on appeal only to the extent that they are "plainly erroneous." Moreover, where the facts are "constitutional" facts rather than "adjudicative" facts, the trial court has enormous discretion as to whether to permit them to be proved at all. The trial court's exercise of that discretion may affect the rule of law that eventually emerges from the case, even at the level of the Supreme Court of the United States itself.

In addition, such matters as the timing of proceedings, the forms of interlocutory and final equitable relief, and the conduct of settlement conferences evade appellate review completely. In many injunctive proceedings, the date when the case is heard is decisively important: it is set, unreviewably, by the trial court. In other cases, the shape of the court's remedial decree—a subject almost wholly within trial-court discretion—determines whether plaintiffs win a paper victory or a real one. In still other cases, low-visibility procedural decisions, such as

whether the defendants' motion for summary judgment is consolidated for hearing with the plaintiff's motion for a preliminary injunction, or whether the preliminary injunction hearing is deferred until the completion of discovery depositions, may determine the outcome of the case. These are not matters that are correctible on appeal. Nor, of course, are the attitudes expressed by the court in off-the-record settlement negotiations—where, once again, cases are effectively won or lost.

The composition of the trial court, then, makes a great deal of difference in the disposition of the case, whether or not it is appealed. And three-judge district courts, in the civil-rights cases now heard by three-judge courts, seem to me far more likely than single judges to resist local pressures that may sway disposition against the civil-rights claimant. For these reasons, I would worry about the abolition of the three-judge courts even if I thought that their abolition could be expected to produce a very substantial reduction in the workload of the courts. But I do not think it will.

The burden upon the Supreme Court of direct appeals in three-judge court cases seems to me exaggerated. Most such appeals are disposed of summarily by the Court—that is, at the cost of approximately the same amount of time and attention as would be required to read and deny a petition for *certiorari* in a case heard successively by the district court and the court of appeals under S. 271. Unless things have very much changed since I was a Supreme Court law clerk in 1960–61, most appeals that are decided by full opinion after briefing and argument in the Supreme Court are cases in which *certiorari* would be granted anyway.

As for the lower courts, S. 271 probably would reduce the burden upon the district courts somewhat, and increase the burden on the courts of appeals somewhat. Both the reduction and the increase would be a drop in the bucket of the over-all workload of the lower federal courts. Compared with other approaches to the workload problem—such as an alteration of the diversity jurisdiction—they would be a very small drop in a very big bucket. I would therefore suggest that the three-judge district court matter might more properly be deferred pending a broader reexamination by Congess of the jurisdiction of the federal district courts—a reexamination which, of course, will soon be necessary whether or not S. 271 is now enacted. I have heard no reason advanced why the House should consider and enact S. 271 prior to the completion of that kind of general jurisdictional reexamination. To do so would be to sacrifice significant values in the enforcement of federal civil rights in order to achieve only a dubious and almost certainly inconsequential effect on the business or the workload of the courts.

I very much appreciate your consideration of these views. Be well. Have a happy holiday season.

With best wishes,

ANTHONY G. AMSTERDAM.

Mr. KASTENMEIER. Further inserts may be made of communications received by the subcommittee.

The Chair now welcomes our first witness for this morning, who with the consent of Mr. Jones, general counsel for the NAACP, will be Mr. Charles Morgan, Jr., Esq., executive director of the ACLU. Mr. Morgan is appearing first today because he is anxious to return to New York to celebrate, we understand, the 90th birthday of Roger Baldwin, who is a patriarch of his organization for many years, and I do hope you will convey to him best regards from the subcommittee.

Mr. Morgan, you may proceed.

TESTIMONY OF CHARLES MORGAN, JR., ESQ., EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. MORGAN. Yes, I will do so.

I am Charles Morgan and I am director of the Washington office of the American Civil Liberties Union. My testimony has previously

been provided to the committee. I trust there is no need to read that which has been previously provided, so I would like to touch on some areas of it and go into perhaps a couple of fields of some explanatory matters which are not contained in the prepared testimony.

Some years ago I left the University of Alabama and began practice in Birmingham, Ala. I practiced there as a private practitioner of the law from 1955 to 1963. During those years in private practice, there were numerous artifices used in the Deep South to exclude blacks from juries. Artifices were not used with respect to the exclusion of women from trial juries in State courts. With respect to women, the statutes of Alabama, Mississippi, and South Carolina, barred their participation on juries outright. And, at that time, under Federal law, the U.S. District Court juries were selected primarily from the State court jury rolls, under a key man jury system. That law, of course, has been amended in the Federal Jury Selection and Service Act of 1968.

During those years, and thereafter, with the American Civil Liberties Union, and prior to that time, with the NAACP Legal Defense and Educational Fund, it has been my pleasure to engage in a large number of civil rights cases, both in State and Federal courts in the South, some before juries, some before judges. Based upon that experience and based upon some knowledge of southern history, I have come to the conclusion over the years that the basic instruments of reconstruction at the time of the Reconstructionists were essentially three-fold. They related to transfer or vesting the instruments of power in the previously disfranchised and enslaved community. The three related to the administration of justice, the right to vote and the economic freedom guaranteed in the cry of 40 acres and a mule.

The ACLU, when I opened the Southern Office in 1964, became deeply involved in two of those fields: The right to vote and the administration of justice.

In the administration of justice field, under my direction or personally, I have been involved in literally scores of Federal court cases against State court jury officials to desegregate jury roles in the Deep South and in Deep South counties. In the States of Alabama, Mississippi, South Carolina, Virginia, and other Southern States, we have systematically undertaken a planned campaign whereby law suits are filed in Federal courts and Federal court injunctive orders are obtained against State court jury officials. In that manner the State court jury rolls are revamped. They then are under a court order, so the enforcement problem we had prior to that time does not exist.

Prior to the time that we inaugurated that affirmative program in the Deep South, the questions would ordinarily arise as follows:

If you had a case where a black was accused of a crime against a white, a lawyer if he were black, would raise the question of systematic exclusion of blacks from the juries. That was not true of white lawyers. In the Fifth Circuit in 1959 in a classic case. *United States* v. *ex rel Goldby* v. *Harpole*, which related to the waiver of the right to question the makeup of juries, the opinion, as I recall it, by Judge Rives, indicated that "rarely to the point of never," within the experiences of the judges of the Fifth Judicial Circuit, had a white lawyer raised the question of systematic exclusion of Negroes from juries. For that

reason, they said, a black convicted of a crime in State court could later raise the jury question in a Federal habeas corpus proceeding with new counsel, if he had not consciously waived that right. Thereafter, in *Seals* v. *Wyman*, that was reinforced. *Seals* v. *Wyman* was, as I recall it, a 1961 case. In the year 1965, some of you may recall that in Lowndes County, Alabama, and during the Selma to Montgomery march and related thereto, there were several killings. One of them was a Viola Gregg Liuzzo, a white woman driving on the highway in the limits of Lowndes County who was shot from a moving automobile. There were others, including the Episcopalian Seminarian from New Hampshire, Jonathan Daniels, who was shot down allegedly by an auxiliary deputy of the Lowndes County Sheriff's Office. Trial came up and it turned out that the Lowndes County, Alabama, juries, a county where 81 percent of the population was black, had never had a black person on its jury. That is never.

At that time we instituted the case of *Gardenia White* v. *Bruce Crook*. One of the great joys of working in the South is the names of your cases, and *White* v. *Crook* seemed like a good case name to desegregate the Lowndes County juries. We sought to stop the trials at that time until the juries were integrated. We did not stop the trial, but we did succeed in striking down for the first time the statute which excluded women from jury duty outright. That was, as I recall, the first application of the Equal Protection clause to the rights of women. Thereafter the juries were desegregated and our south-wide program came forward from that.

Mr. Kastenmeier. May I merely interrupt to inquire in the rear of the room; can you hear the witness? Can you hear the witness clearly? Fine.

Mr. Morgan. What we had encountered prior to this time is that you would go into State court —if you were a black lawyer defending a black criminal defendant for a crime against a white person—and allege systematic exclusion. That person would then fight his way, ordinarily or often under a death penalty, through the State supreme court to the Supreme Court of the United States. After some years the case would be reversed. The case would then go back for a retrial. When it was retried the same all white jury still would exist, the same exclusion of blacks would have taken place, and that person would be retried and the case would go up on appeal again.

In between those two times, the time of first trial and the time of the second trial, literally scores of blacks would have been tried in that system of justice. And I think it is important to bear in mind, with respect to a provision like this that the Supreme Court has said, in effect, that this is constitutional in 66 district courts who are already saying that we do it this way here. But, while we think of that, I think it is of extreme importance to remember that 60 percent of the black citizens of the United States who reside outside of the States of the Deep South were born and reared in those States. And historically from that Lowndes County Courthouse and other courthouses in Greene and other counties in Alabama—and places where I have represented other people, many of them are now public officials—out of those counties, away from those courthouses, came blacks to the rest of the United States. Their experience was with White Man's Jus-

tice. It was white, and it was male. That system of justice with which I had experience told them that since they were excluded from it, except as defendants, the system itself was unfair. For years those of us who believe in the Constitution and who believe that it provides means for change—and I think the proof of the last 10 or 15 years is that it provides the means for substantial change—found ourselves constantly confronted by people no matter where they were, in what city, and especially in the North where change was coming much slower and hope was not quite so high as in the South, we found ourselves in the position of many——

Mr. KASTENMEIER. Excuse me.

Would those of you in the aisles, could you please clear the aisle or bring your chairs forward so that the people can get through. Thank you.

Mr. MORGAN. We found ourselves, many of us, in a position of saying take your struggle out of the streets and into the courts. The quite natural reaction to that was "out of the streets and into the enemy," because that historically, was what the courts had been.

Now, Professor Zeisel can talk quite clearly about the demonstration examples he has with respect to the mathematical probability of minority people appearing on juries when the size of the jury is reduced from 12 to any number and especially to the number, the lowest number of six. I see no devious scheme or anything else in this, but I see numerous proposed rights restrictions in the United States just as we have accomplished and achieved in the administration of justice, a degree of fairness. For example, our work in the South didn't extend only to juries. It extended to public employment. The first of the public employment cases was in the city of Montgomery, Ala., in Judge Johnson's court. It extended desegregation action, as I recall it, against seven State employment systems institutions in order to integrate the system of justice from top to bottom in the South so that the previously excluded were counted in. I think that that program has affected substantial changes. Some examples of those kinds of changes I have set out in my prepared testimony.

But, the important consideration to me is that Congress must not legitimatize a number of jurors which by the very number will result in the exclusion of blacks and other minorities, and perhaps poor whites, from actual service on trial juries in civil cases. Now, it seems to me, and as I mentioned earlier I see no great conspiracy, that a number of things happening in American life disturb me greatly. For instance, when Mr. Justice Rehnquist was with the Department of Justice, I do not have his exact quote, he testified before a Senate subcommittee about speedy trials. He also talked of another way in which the trial process could be hurried up—nonunanimous verdicts or smaller juries in Federal criminal cases. The Supreme Court thereafter rules that the State courts may have nonunanimous verdicts and certainly they may have six-person juries.

All of the drives for efficiency that I see coincide with the inclusion for the first time in American history of all, almost all, excluded groups from jury duty, and jury duty is the esssence of democracy. I like to try cases before juries. I know a lot of my campanions in the ACLU and elsewhere love to go before courts and they love to

go up in the court system and argue in the Supreme Court. I like it myself. Perhaps it is my southern background or political background, but I have never had a view of history which indicated that much of the progress of man came from judges.

From 1954 to 1968, I think we were blessed in this country with a Supreme Court which when other instruments of Government didn't move, did move. The society moved with that instrument. We were very blessed to have that court. But I know that it is the American jury system, whether it is in Harrisburgh, Pa., or in Gainesville, Fla., which says no to incursions by the Government on the rights of citizens. I believe that any modernization—"modernization" that relates to the diminution of the jury as a structure with the unanimous vote requirement—results in the taking from the citizens of a supra legislature.

Now, nobody ever told me this in law school, and nobody has ever told me afterwards, but I know in my own heart and mind that when I go before a jury I am dealing with the most powerful single body in American life. It is a supra legislature and if it is drawn from a cross section of the community, that is all I can ask for, simple fairness. I know the judge will tell that jury what the law is and what has been made law by legislatures. I know that both sides in the case, the prosecution and the defense, if it be a criminal case, or the plaintiff and defense attorneys in a civil case, will present the facts as will the witnesses. And the jury will go out and make a new law. It will enact that law amongst itself in secrecy and in private and will do so with a community conscience and voice. And it will do so as a supra legislature. It can take a person's life, liberty—no longer life, I hope, but liberty and property.

As I think all of the kinds of incursions upon that jury system which I see, I hope and pray that the Congress will not formalize them, because I think we should go back to where we started from. And where we started from hundreds of years ago is right where we ought to be.

I will be happy to answer any questions.

Mr. KASTENMEIER. Thank you, Mr. Morgan. We will include your statement in full in the record.

[Mr. Morgan's statement follows:]

STATEMENT OF CHARLES MORGAN, JR., DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 256,000 members devoted to the guarantees of the Bill of Rights and the protection of the individual thereunder. Over the years the ACLU has steadfastly resisted the erosion of our constitutional rights and liberties and has sought instead to extend those rights and liberties to persons who have been denied them in the past.

A major focus of ACLU activity has been the constitutional guarantee of trial by jury in both civil and criminal cases. The ACLU has consistently opposed tampering with the twelve-person unanimous jury historically required for criminal conviction. At the same time, we have persuaded courts throughout the United States and the Congress to extend the rights and responsibilities of jury service to blacks, women, and other minorities who were for so long excluded by custom, prejudice, and law from criminal juries. *E.g.*, *White* v. *Crook*, 251 F. Supp. 401 (M.D. Ala. 1966); *Whitus* v. *Georgia*, 385 U.S. 545 (1967).

Although we have not yet formulated a final policy regarding the reduction in size of federal civil juries, our Due Process Committee—a standing commit-

tee which reports regularly to our board—has recommended opposition to H.R. 8285 and any legislation that would cut back the size of federal juries on the grounds that such a reduction would adversely affect the nature of the jury process, the deliberations of the jurors, and the verdict itself. As soon as our board has acted on this recommendation, our final statement of policy will be forwarded to this Committee.

Meanwhile, I would like to tell you why, as a Southerner and a lawyer, I strongly oppose reduction of the size of federal juries—or any other measure that would dilute the constitutional guarantee of trial by jury.

The stated motive for proposals to reduce the size of juries—or to permit less-than-unaminous verdicts—is a laudable one; governmental efficiency. Proponents of six-person juries, including Chief Justice Burger, have estimated that in civil cases alone, the result would be a savings of about four million dollars a year. *See* H. Zeisel, ". . . And Then There Were None: The Diminution of the Federal Jury," 38 *U. Chi. L. Rev.* 710, 711 (1971). Moreover, it has been suggested that six-person juries would consume less time in selection and in deliberation, thereby contributing to judicial economy and providing more defendants with the speedy trial which the Constitution also guarantees them.

Saving time and money are no small matters. But statutory reduction of civil jury size will not save quite so much of either as it seems at first glance.

Despite much-publicized trials in which jury selection has taken days or weeks, nearly all juries are selected in a matter of hours—or minutes. Most judges question the jurors as a group, not individually—thus taking exactly the same amount of time to examine six as to examine twelve. Speculation that six-member juries will take less time to reach their verdicts must give way to contradictory statistics that suggest no one really knows whether they will take less time—or more. Although 5.6 per cent of criminal trials result in hung verdicts in unanimous verdict jurisdictions, as opposed to 3.1 per cent in jurisdictions where a unanimous verdict is not required, Kalven & Zeisel, "The American Jury: Notes for an English Controversy," 48 *Chi. Bar Rec.* 195, 200 (1967), one study found that six-member juries weighing a simulated civil damages claim were *more* likely to hang than twelve-member juries deliberating the same case. Note, "An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes," 6 *U. Mich. J. L. Ref.* 712, 722 (1973). In that same study, the six-member juries took slightly *more* time than the twelve-member juries to reach a verdict—even though both sets of panels, following Michigan law, were required to reach only a five-sixths consensus. *Id.* at 724–725. That data suggested that jurors are more willing to speak—and argue—in smaller groups. *Id.* at 729, 732.

Other studies have yielded opposite results. *E.g.*, Institute of Judicial Administration, *A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts* (1972).

But is this numbers game worth playing? Do we really want juries to spend less time considering the evidence than they spend now? According to a recent study in which jurors in 213 different criminal cases were interviewed, almost all juries took a vote as soon as they retired to their chambers. In 30 per cent—nearly one-third—of the cases, it took but one vote to reach a unanimous decision. H. Jacob, *Justice in America: Courts, Lawyers, and the Judicial Process* 114 (1965). Perhaps those 30 per cent were unusually clear-cut cases. Or perhaps they were votes taken late in the afternoon, among jurors anxious to return to their jobs, homes, and families. The statistics do not say. Perhaps with juries of six rather than twelve, the number of first-vote decisions will increase. Such decisions may accord with the law and the facts. Or they may not. We do not know. But we do know that they deprive defendants of the heart of the jury process—that reasoning together, that sifting and weighing of separate viewpoints from which justice is supposed to emerge.

Still another argument in favor of six-person juries has been that at a single swoop we will save roughly half the cost of empaneling civil juries. But this theory ignores the fact that already 66—or more than two-thirds—of the 94 federal district court have by local rule adopted less-than-twelve member jury panels for civil cases. (Information available from the General Counsel's Office, Administrative Office of the United States Courts.) See *Colgrove* v. *Battin*, 413 U.S. 149 (1973), holding that the Seventh Amendment does not forbid federal courts from promulgating local rules providing for six-person juries in civil cases. Because the move to six-member juries in civil cases is relatively recent, studies are not available to assess the results in federal courts. If, as I strongly believe, time and experience will prove that this experiment seriously infringes the due process

and equal protection rights of plaintiffs and defendants, the premature freezing of the law by statute can only store up constitutional difficulties for the future.

In fact, the argument for judicial economy at the expense of hard-won constitutional rights is itself suspect. As Justice Black once wrote:

"Trifling economies . . . have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the government to convict those it accused of crimes. On their scale of value justice occupied at least as high a position as economy." *Green* v. *United States*, 356 U.S. 165, 216 (1958) (dissenting opinion).

In *Rabinowitz* v. *United States*, 366 F. 2d 34 (5th Cir. 1966), the Court of Appeals for the Fifth Circuit rejected the notion that democracy may be sacrificed to efficiency under our judicial system. Striking down the discriminatory "key-man" method of jury selection, the court quoted with approval Justice Murphy's opinion in *Glasser* v. *United States*, 315 U.S. 60, 86 (1942):

". . . the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community." . . . Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." *Rabinowitz*, supra, 366 F. 2d at 45.

The reduction of civil juries to six members is but the latest proposal in a series of steps which are slowly but inexorably impairing the fundamental right of trial by jury. As we have seen, it is but a step from ruling that the Fourteenth Amendment does not forbid the states to limit criminal juries to six members in non-capital cases, *Williams* v. *Florida*, 399 U.S. 78 (1970), to holding that the Fourteenth Amendment does not require state juries to be unanimous either. *Johnson* v. *Louisiana*, 406 U.S. 356 (1972); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). And the erosion of the right to the unanimous verdicts of twelve-member criminal juries coincides with the diminution of civil juries—this time in federal courts. *Colgrove* v. *Battn*, *supra*. Indeed, these attempts at judicial and legislative tampering with the jury system further coincide with the partcipatory expansion of that system to citizens previously excluded from it because of race, sex, or economic status. This Committee can help to reverse the trend by refusing to endorse it and by confirming the historically essential features of trial by jury.

A number of commentators have argued that reducing the size of the jury neither limits its crucial function of community representation nor changes the results that it reaches. *See, e.g., Williams* v. *Florida, supra*, 399 U.S. at 101 and authorities collected at *id.* n. 48; *Colgrove* v. *Battin, supra*, 413 at — n. 15, 93 S. Ct. 2448 at 2454. Others have strenuously argued the opposite. *E.g.*, Note, "The Effect of Jury Size on the Probability of Conviction: An Evaluation of *Williams* v. *Florida*," 22 *Case W. Res. L. Rev.* 529 (1971); H. Zeisel, ". . . And Then There Were None: The Dimunition of the Federal Jury," 38 *U. Chi. L. Rev.* 710 (1971). But at least one article—favoring smaller juries as providing a better chance for jurors to be heard—gives the game away. "There might also," observed the author, "be fewer opinions on each issue to discuss." Note, "An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes," 6 *U. Mich. J. L. Ref.* 712, 718 (1973). Similarly, Justice Marshall, dissenting in *Johnson* v. *Louisiana*, *supra*, objected to non-unanimous juries on the grounds that "there is all the difference in the world between three jurors who are not there, and three jurors who entertain doubts after hearing all the evidence. In the first case we can never know . . . whether the prosecutor might have persuaded additional jurors had they been present. But in the second case we know what has happened: the prosecutor has tried and failed to persuade those jurors of the defendant's guilt." 406 U.S. at 401.

Justice Marshall meant only to prove that where some jurors disagree, "it does violence to language and to logic to say that the government has proved the defendant's guilt beyond a reasonable doubt." *Id.* But he proves more. He leaves us with an indelible image of the three—or the six—jurors who weren't there.

Who indeed can tell how they would have voted? Or whether they might, simply by their very numbers, have brought a wider experience, a greater charity, or a deeper vision to bear on the problem at hand?

In the South for many years blacks, women, and poor whites were the jurors who were not there. Federal juries were not "truly representative of the community," for they were hand-picked by a self-perpetuating elite under the so-called "key man" or "blue ribbon" jury system. No black on trial for his liberty or his life could so much as hope to be tried by a jury that included even one of his peers. No black could sue a white in civil court and expect to come away with much more than empty hands. And, if blacks came away with verdicts for personal injuries, the sums which they carried from the court house were less than those granted whites with similar injuries.

Lawyers for the American Civil Liberties Union and other organizations concerned with civil rights and liberties successfully challenged that jury system and changed the face of justice in the South. The Southern Regional Office of the ACLU led the drive for federal statutory reform, which produced the Jury Selection and Service Act of 1968, P.L. 90–274, 82 Stat. 54, 28 U.S.C. §§ 1821, 1861–1869, 1871, eliminated the "key man" system, and reestablished the principle that juries must be "selected at random from a fair cross section of the community" with no one excluded from service by reason of race, color, religion, sex, national origin, or economic status. But everything we fought for—and won—can be lost if minority representation on juries is diluted or destroyed by a non-unanimous jury or a jury of six instead of twelve. As Professor Zeisel has conclusively demonstrated, minority spokesmen are far less likely to serve on randomly selected juries of six than on such juries of twelve. Zeisel, *supra*, 38 *U. Chi. L. Rev.* at 716.

The presence of a community cross-section on the jury rolls, on jury venires, and on grand and petit juries *does* make a difference. So long as jury unanimity is required, even one minority member can change the result by challenging the prejudices of the majority. As in all of life, the mere *presence* of the black or the woman changes the speech and thought of trial juries. The mere inclusion of members of previously excluded groups on trial juries alters the conscience of the non-excluded and enhances the quality—indeed, the understanding and fairness—of the verdict. Opening the jury rolls—and the trial jury itself—to all members of the community can reawaken a lost sense of community responsibility for and participation in the judicial system. It can change lives.

The 1960 population of Greene County, Alabama, was 13,600—81 percent of them black. On August 30, 1961, a white garage attendant was killed by a Negro man. Twenty-eight-year-old Johnnie Coleman, a married man with six children, was found guilty of murder by an all-white jury and sentenced to death. For six years he waited on death row—within a few yards of the electric chair—while the Alabama courts twice held his conviction valid. On a second appeal to the Supreme Court of the United States his conviction was reversed.

In the intervening years another civil rights organization had sued in federal court to desegregate Greene County juries. The jury rolls were now 50–50, black-white. On retrial in April, 1968, Coleman's Negro attorney, Orzell Billingsley Jr., challenged white men. The district attorney challenged white women. An all-Negro jury—of solid community people, none especially active in civil rights—found Johnnie Coleman not guilty.

A truly representative jury panel can offset the discriminatory effects of peremptory challenges used to prevent minority-group members from serving on petit juries. When the defendants in the 1964 Philadelphia, Mississippi, civil rights killings were at last brought to trial on federal conspiracy charges in 1967, 50 prospective jurors, including 18 Negroes, appeared on the panel. The government had six peremptory challenges, the defendants 28. The defense used 18 to rid the jury of blacks. Since the defendants had but ten strikes left, the jury included seven women. They and the five men who served were from a different social and economic background than members of earlier civil rights conspiracy case juries where no blacks had appeared among the prospective jurors. The all-white jury made Mississippi history by finding seven of the 18 defendants guilty as charged.

In Pickens County, Alabama, where 45 per cent of the population was black, Willie L. Smith, a black man, was charged with the first-degree murder of E. H. Anders, a white man, on August 28, 1968. Again, an affirmative suit had caused the jury rolls to be reconstituted. An all-black petit jury was organized.

The judge declined to go forward with the case on the grounds that he had become too "involved." Another trial was set for September 24, 1969.

The defendant was tried before a jury consisting of two black women, four black men, five white women, and one white man. On September 25, 1969, the jury deliberated for three and one half hours before finding the defendant not guilty. This was a first for Pickens County.

These are but three of many instances in which representative juries have deepened community involvement in the judicial process. The stories are not all the same. Representative juries have not only been more willing to accord constitutional rights to blacks and to right wrongs committed against them and other minorities. Cross-sectional juries have also been stern enforcers of community standards against blacks who prey on other blacks.

White man's justice—enforced by exclusively white male juries—effected a quadruple standard in the communities of the Deep South and, perhaps, the nation. For even today 60 per cent of America's non-Southern black population were born *and reared* below Mason and Dixon's line. Below that line when they were growing up the court house was the enemy, the symbol of order not law, for their struggle was essentially one of law against the Order—an old, harsh, and unjust Order at that. White man's justice provided disparate sentences—death for blacks charged with crimes against whites, less harsh but still severe punishments for whites charged with crimes against whites, lesser punishments still for whites charged with crimes against blacks, and wrist-slaps for blacks charged with crimes against blacks.

The standards of civil justice were also disparate. A white leg was worth far more to an all-white jury assessing personal injuries than a black leg, and the forbidding white man's court house was hostile territory for black litigants. Blacks entered there as defendants or as seekers of licenses or not at all. And, when they entered as defendants they most often left poorer if they freely left at all.

Thus the cry to "take your struggle out of the streets and into the courts" sounded to many like "take your struggle out of the streets and into the house of the enemy."

Representative juries do not mean more justice for one group and less for another. They mean equal—and better—justice for all. Placing blacks on juries does not mean that black defendants are going to "beat the system." They will merely be tried in accordance with constitutional mandates. Most Southern defense lawyers now feel that Negroes are far more likely to convict and give stiff penalties that whites. Indeed, in national surveys taken in big city slums, Negroes' main concern with police is not that they are brutal but that they are unavailable. Blacks are more worried about crime in the streets than whites, and Negro jurors and grand juries are likely to put a stop to it.

Indeed, jury studies in recent years have shown that juries do a far better job than their critics claim. *See generally*, Kalven & Zeisel, *The American Jury* (1966). As the Supreme Court observed in extending to state courts the constitutional guarantee of jury trials in non-petty criminal cases:

". . . the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they are created and for which they are now employed." *Duncan* v. *Louisiana*, 391 U.S. 145, 157 (1968).

In other words, juries help make the law workable "in single cases by applying their common-sense notions of what justice demands." H. Jacobs, *Justice in America: Courts, Lawyers, and the Judicial Process* 118 (1965). It is simple logic that the twelve-member jury has twice the potential fund of common sense and everyday wisdom than a jury half its size. It has twice the opportunity to include a member or two peculiarly sensitive to the problem before it—civil or criminal—and peculiarly able to assess where truth and justice stand in an individual case. And it has twice the authority and legitimacy in the community by which to make its own decisions acceptable.

As the Court of Appeals for the Fifth Circuit noted in *United States* v. *Pearson*, 448 F. 2d 1207 (5th Cir. 1971), it is not enough to include a cross-section of the community on the jury rolls if minority spokesmen seldom or never have the actual opportunity to serve on juries. The court quoted from an article in the Mississippi Law Journal:

"Regardless of how many veniremen there are of defendant's race, if none actually serve on the jury because they are peremptorily challenged, then a form

of systematic exclusion has occurred and the intent and purpose of an entire line of decisions has been thwarted. . . ." 448 F. 2d at 1217 n. 25.

The importance of truly representative juries is not a new idea. As far back as 1787, a farmer named Richard Henry Lee expressed the notion that representative juries hold a place in the judicial system, for without them it becomes isolated, undemocratic, and unresponsive to the changing will of the people. "It is essential in every free country," he wrote, "that common people should have a part and share of influence, in the judicial as well as in the legislative department. To hold open to them the offices of senators, judges, and offices to fill which an expensive education is required, cannot answer any valuable purposes for them. . . .

"The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other." Richard Henry Lee, "Letters of a Federal Farmer," Letter IV, October 12, 1787, in *Pamphlets on the Constitution of the United States* 316 (Paul Leicester Ford ed. 1968).

The place where the public maintains ultimate control of the civil and criminal justice system is in the jury box. The final arbiter of the legal profession's affairs is and should be the jury. But the jury can fulfill its historic role only if it represents a wide cross-section of the community—if it represents all of us. The traditional—and constitutional—compromise between filling the jury box with every member of the community and leaving its functions to a majority of one has been the twelve-member, unanimous jury. It has served us well. We should not diminish it in a gesture toward false economies. As the Supreme Court warned in *Ballard* v. *United States*, 329 U.S. 187, 195 (1946), quoted in *Rabinowitz* v. *United States*, *supra*, 366 F. 2d at 59–60, in narrowing the community base of the jury, "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

Most of your statement and the history you recall of the recent past I gather relates to criminal proceedings, particularly in the South; while you realize this is exclusively a civil jury that we are talking about.

Mr. MORGAN. Yes. Let me discuss that with you with respect to civil juries. The jury system itself is the great arbiter, I believe, in the community. For instance, I was involved in some school desegregation cases. In the *University of Alabama* case, I represented two of the four plaintiffs who sought admission in 1963. But, primarily, the legal defense fund and the NAACP were engaged in the school desegregation matters.

Now, it seems to me that when a person is going to send a child to school, a black person in a Deep South county, they somehow need a jury system in their county as a protector. When I think of criminal grand juries, that is one protector and criminal trial juries, that is another. But, when we think of a black workman who is involved in a civil damage suit, I know as a lawyer, that a white jury evaluates a black person's injuries quite differently from those of a white person, because white people are more valuable to white people and I trust black people are more valuable to black people. Perhaps that is the way of life, perhaps it is not. And, I know this, that if my name is Ralph McGill in Atlanta, Ga., and I have a newspaper called the Constitutioin and I take certain positions that are unpopular, the lawyers to whom my paper goes for approval on libel action with respect to questions of libel, the thought process that I go through as a citizen as I write those articles relates peculiarly to the law of libel and the

civil jury system with respect to the speech and press activities in the Deep South.

Let's go beyond that to other kinds of civil questions with respect to a jury. Many of us have been engaged for years in trying to make certain that blacks and other minority people went to law schools and came out of law schools and wound up practicing law. I used to say it this way, that in counties like Lowndes County, Ala., and Greene County, Ala., if it is the lawyer who represents the Southern Railway, which may pass through, who wants to go off and stand in the schoolhouse door during school desegregation and the railroad hits a cow and that same lawyer who stood in the schoolhouse door represents the owner of that railroad and he has to face a trial jury, with blacks on it, then the likelihood is, his verdict will be affected thereby.

Now, the black lawyer's life was very difficult, for instance, in a big city in the South. Let's take Birmingham. For years when a black person was injured and went to a black attorney, the black attorney, because of the all-white jury system, civil court jury system, took that case to a white plaintiff lawyer to file the lawsuit. And the black attorney never appears. The black victim receives lesser damages. The white attorney may or may not share the fee with the black attorney but the simple fact remains that the black attorney in the community, without a jury system in civil cases that is fair and across-the-board, cannot practice there and earn a decent living.

So, all of the lawyers that we come out of the law school with and the southern law schools some of them have done very well. Josh Morse, for example, at Old Miss, started out with 33 blacks in one freshman class I remember. But men cannot support themselves in that system of justice unless they have civil court juries which also include members of the minority groups that they may well represent in civil rights and other kinds of controversial cases. When you think of juries in civil cases, I think it is important to think this way: If you are the president of an insurance company, if you are an insurance adjuster, adjusting a claim with Allstate or State Farm for a black person, your conduct and attitude with respect to the disposition of the matter at hand has to relate to the jury system itself.

Mr. KASTENMEIER. I take it this is really a judgmental thing, is it not? In your judgment this is the case, or your experience? You do not have any statistical data evidencing the fact? For example, if on a 12-person jury in a given area 4 would be black persons in a one-third black judicial district, do you deny that with the 6-person jury 2 would be black? You have no evidence that that would not be the case, have you?

Mr. MORGAN. No. I know this though, with double the number, I have more chance to have more blacks. And when I get——

Mr. KASTENMEIER. And it would be truer with 24 than with 12?

Mr. MORGAN. Certainly. But 24 is not the number that we have come through with since 1300. Twelve is. When we look at what you are mentioning now, let us take an area like Jefferson County, Ala., with just a 25-percent black population. Most of the counties in the South are white counties. Of the 600-plus counties in the South, approximately only 100 have more than 50-percent black population. In some States you have two strikes to one if you are in a criminal case. In a civil case it is strike on strike or peremptory challenge on peremptory

challenge. Some places you have a struck jury and you come down to 12. The larger the jury, as I understand Professor Zeisel's figures, the more likelihood I have of one or more blacks in a minority black county, and the more likelihood I have of women in the States where there participation in juries is permissive, and their number on the roll is not equal to men. I do not want to see that likelihood legislated away.

And, second, my views based upon my experience and not upon statistical or empirical studies. I know of none. But I know this. I hear from lawyers in Mississippi that former Gov. Ross Barnett has spoken at bar meetings and elsewhere about the fact that black jurors sure are good in plaintiff cases. He is a plaintiff's lawyer. I, as member of the Alabama Bar Association, know a number of lawyers who discuss the fact that women keep verdicts down and do not think "as big money" as men do. Thus, I know there is a different community conscience with these folks included on the juries.

As a private practicing lawyer, I know darned good and well that there are differing criminal standards of justice, differing sentences. For a black crime against a white, there used to be the death penalty; for white crime against a white, stern punishment; for white against black, less sentence; and for black crime against black, a wrist slap. In this country the major fear of crime is amongst blacks about blacks committing crimes upon them. Thus it seems completely reasonable to me that a system of justice which has given black against black crime wrist slaps punishment the standards of the community in the administration of justice will be low.

Mr. KASTENMEIER. This morning you have testified against the six-person jury in terms of the South and civil rights cases. These are racial questions, and I take it that that is the principal thing. Are there other reasons that you would oppose, other than drawing on the civil rights experience in the South, that you would oppose the six-man jury?

Mr. MORGAN. I want to make it clear that I am not just drawing on my civil rights experience. I practiced law for a number of years in the South as well as handling civil rights cases. I was handling primarily noncivil rights cases like any other practitioner of the law. Second, there is a civil rights effect, but I am not just talking about civil rights cases. I am talking about the fellow who has a breach of contract problem, a person who just wants equal justice with respect to his property. I think that the same things would apply to the rest of the country that apply to the South. But, it happens that is where I am from and that happens to be the place about which I know the most. So, that is what I testified about. I know from Professor Zeisel's statistics, and from studies made, that the likelihood is that in other sections of the country where there are smaller percentages of minority people in the total community, there is less likelihood that they would appear on juries. We want respect for the jury system. That is more important than all of these "modernization" programs. You know, we have so many goings-on, we have many courts, and we hear people talk about limitation on this or that kind of court work, and say that judges are overworked. I keep hearing this, you know, but my approach to that is that is what they get paid for.

Mr. COHEN. Mr. Chairman, could I ask a question here?

Mr. KASTENMEIER. Surely.

Mr. COHEN. I believe you stated your concern about the those areas where they have a small minority population and their chances being diminished as a result of cutting down to the six-man jury. But, I do believe you testified earlier that, is it Lowndes County, where it is 80 percent black, and yet there was not any greater proportion or percentage of black people represented there. If we are talking about the South, are you dealing with a situation in the South where you have a small proportion of minorities or a much larger proportion of minorities?

Mr. MORGAN. It varies as does the rest of the country. In some areas, in say the mountainous counties in the South—down through Virginia, North Carolina and along the Appalachian Mountains in Kentucky, where my father was born, down to North Alabama—there is a very small percentage of blacks; counties have few, if any blacks, in the Deep South. And it varies from few to the many in the black belt population, a belt which runs across the South and there you have 100 counties with 50 percent or more. In between those two, you have the same situation you would have, I trust, in some sections of Maine.

Mr. COHEN. I don't think that that would be an appropriate analogy in terms of black population.

Mr. MORGAN. No, but in terms of other populations.

Mr. KASTENMEIER. I yield to the gentleman from Massachusetts, Mr. Drinan?

Mr. DRINAN. Thank you very much, Mr. Morgan.

Would you agree with the dissent in the *Colgrove* case where Justice Powell says this exceeds the power of the rule as it now exists? Justice Powell disposes of the whole question simply by saying that local rule 13 is incompatible with the Federal Rules of Civil Procedure. I mean, is that your position?

Mr. MORGAN. Well, let me just go back a little bit, if I may. My position is, that the jury system consists of 12 people. If I had to go to the constitutional question—the Supreme Court decision allows the limitations of the size of juries, civil or criminal, on the constitutional decisions—I would take the flat literal interpretation that the jury is a jury of 12 peers. We moved beyond that in *Colgrove* and looking at this piece of legislation, I have no doubt it would be upheld by the Supreme Court.

Mr. DRINAN. They have done it already.

Mr. MORGAN. Sure. So, there is no question in my opinion as to what this Supreme Court will say. It is constitutional. My question is, should this be formalized in Federal legislative policy? It has already been tried out in a number of districts and is now used in 66 Districts, as I understand it.

Mr. DRINAN. How many of those are in the South?

Mr. MORGAN. I do not know. I know in some of the very good districts it is being practiced.

Mr. DRINAN. Theoretically, it is optional and both the plaintiff and defendant have to acquiesce, although when we had testimony in October we had some suggestion that it was virtually mandatory and that you cannot cop out because they say we only have six people available. Do you have any background on that, that if both plaintiff and defendant agree, would your objection be as strong?

Mr. Morgan. My objection—in a civil case, I am almost certain that plaintiff and defendant can agree to almost anything, you know, as far as procedural matters are concerned. With juries, you can waive certain rights, if they are meaningfully waived, and known about in advance.

Mr. Drinan. Isn't that only what the judicial conference is asking for?

Mr. Morgan. Well, that is not the way I read the bill. As I read the bill——

Mr. Drinan. Well, they want to make it permissive across-the-board so that it may be had in every single judicial district rather than the 63 or 66. But, they do not, as I read the statute and testimony we had in October, at least theoretically they do not want to impose this upon any unwilling plaintiff or any unwilling defendant.

Mr. Morgan. Let me carry it just a little bit further, if I might. About a week or so ago I was told that in the State of Ohio they are now video taping trials. They video tape the testimony of witnesses and they do it by consent, and when they finish doing it by consent, the Judge comes in and looks at the tape, rules on objections and in this way he handles six or eight trials a day.

Now, I know that there is a societal risk in this even where waiver is required. It is the right of the individual citizen to not have his class excluded from juries, even if he is not a litigant, or she is not a litigant, and even if he or she is not involved in a criminal prosecution. Somehow by the inclusion of people into jury duty and jury service in large numbers, the respect for the law and the rule of law is enhanced. So, I am not thinking in terms of the rights of the litigants alone, I see a positive value in just a jury of 12 people.

Mr. Drinan. As you may know, the problem in the Federal court is the incidence of torts. Sixty-eight percent of all jury cases in the Federal courts arise out of auto accidents or other torts, mostly autos. Out of 3,600 civil cases, civil trials, 2,400 pertained to automobiles, who got to the intersection first? Do you have equally strong objections if on an optional basis, the plaintiff and the defendant may, with full consent, free consent, say six-person juries are sufficient in 68 percent of the cases in the Federal court?

Mr. Morgan. I would like to answer that directly, and I will, but I would like to make one more observation.

Mr. Kastenmeier. If you will yield, the Chair would like to point out so that the record is clear, that the bill we are considering makes no provision for the retention of the 12-man jury whatsoever. It reads: "The jury shall consist of six jurors unless the parties stipulate to a lesser number."

There would be no provision whatsoever for more than a six-person jury, under any circumstances in civil cases, as I understand it.

Mr. Drinan. Mr. Chairman, is that the only bill available? Is that what the judicial conference has endorsed?

Mr. Morgan. That is my understanding.

Mr. Kastenmeier. That is H.R. 8285. I understand that.

Mr. Drinan. All right.

Mr. Morgan. That was my understanding and my testimony was directed to that nonpermissive bill. But, I do think you have raised a good point with respect to 68 percent of the cases being tort cases. At

the Fifth Judicial Conference this year, I was on a panel where we were talking about the limitation of prisoners' rights cases and the limitation of section 1983 civil rights actions. Now, we have bills pending in Congress to limit habeas corpus.

Constantly when I hear about making courts efficient, what I hear about doing is something that deprives or takes something away from a class other than those in business or industry. Securities and Exchange cases, Interstate Commerce Commission cases, nobody talks about taking those away from the Federal court system. Now, I think it is correct that most cases in Federal courts need not be there anyway. They could be done as well in the State courts. The cases that the Federal judges, some of them, and some Supreme Court Justices now, and some Members of the Congress, constantly are trying to get out of the Federal courts are the very cases that Federal courts, since the Civil War, have been designed to serve. There is no longer any question but that the prime reason for existence of the Federal judiciary protect the constitutional rights of the citizens of the United States, and to afford citizens a forum for effecting their constitutional rights. What we have become involved in in this country, through our Federal court system, is this giant crush of commercial claims, claims from business interests, claims with respect to securities cases. Yet the constant trend is to get rid of civil rights actions field for individual persons. That is exactly what is happening, and that is exactly what people are always talking about getting rid of when they talk about getting rid of cases. But, if we are going to have those cases in Federal court, if we are going to have that 68 percent, then I want a cross-section on those juries to consider them, and I think it is by far better that we have it.

Mr. DRINAN. All right, then. Mr. Morgan, will the ACLU, in due course, come to some recommendation on how soon—you say in your testimony right now you are opposed to H.R. 8285 and any legislation that would cut back the size of Federal juries on the grounds that such a reduction would adversely affect the nature of the jury process. Well, do you anticipate that they will be unalterably opposed, even to some concession even, say, in the area of tort law?

Mr. MORGAN. Oh, yes.

Mr. DRINAN. Would they consider, or would you consider some type of a compromise? For example, the Fair Housing Act of 1968 recently the Supreme Court granted certiorari in the case out of the seventh circuit, which held the seventh amendment requires a jury in damage cases. Would you be happy or would you even propose something wherein civil rights cases, or where the plaintiff strongly wanted a 12-man jury, the 12-man jury should be retained, but in other matters, such as the tort area, the 6-percent jury would be allowed?

Mr. MORGAN. No, and the reason for that simply is what I was discussing with Congressman Kastenmeier. If a lawyer is going to practice law in a town—and sometimes lawyers have an awfully hard time in the community they practice in if they take really controversial cases—he has to have a jury system he can go to for other clients that pay him fees. In our system, that is the way it works. He has to be able to defend a person before that jury system and not have a client say, I can't go to George. I like him and he is a great lawyer, except

when he goes before a jury in this community they are going to rule against him because they know who he is. He's that black lawyer or that Spanish-speaking lawyer or that white lawyer who takes cases for minority groups in tough situations. He has got to be able to earn a living or cannot stay there. And if he cannot stay there, then we all turn around and say—well——

Mr. DRINAN. All right. One last question.

Consider the predicament of the subcommittee, that the Judicial Conference has recommended this and 66 of the Federal district courts are doing it anyway. They are going to continue to do it. The number will extend. The claim they have a mandate from the U.S. Supreme Court, even though it was five to four, and that they are going to do it independently of what this committee or the Congress does. So, the only hope right now, it seems to me, is for the Congress to get some type of a compromise where some of the objectives you speak about so eloquently are, in fact, realized in the law. And I would say some type of a compromise where fair housing cases or similar cases do, in fact, have an exemption from the mandatory six-man jury in civil cases.

Mr. MORGAN. Why not just deprive the Federal court of jurisdiction in those Federal cases?

Mr. DRINAN. Where would they go?

Mr. MORGAN. Let them go back to the State courts.

Mr. DRINAN. Well, that is something else. And fair housing, that is something else, also. What I am asking for, Mr. Morgan, is some testimony which helps us with our task, and which helps to correct the de facto situation which will continue if we do nothing.

Mr. MORGAN. My response to that, Congressman Drinan, is this: Many of the Federal judges in this country are great people and wonderful judges. Some value the Constitution more than their own lives and certainly their own personal comfort and convenience. But, as a group, judges as with all of us, have their own interests. I feel certain that judges and many lawyers feel that judges and lawyers have a lot more sense than juries. Some folks always seem to think they have more sense than the people. Now, I don't believe that I have to participate in the process by compromise when, in fact, they want to go off and do something. Let the judges cut the size of juries. Let them do it. But don't formalize it by legislation.

Mr. DRINAN. Did the ACLU, did you intervene in the *Colgrove* case?

Mr. MORGAN. I did not but I do not recall whether the ACLU did.

Mr. DRINAN. Well, I wished you had saved the day then, instead of now.

Mr. MORGAN. I wish we had, too. But, you know what they say when you do not save the day early enough, you do it when best you can and I think the best time is now.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Morgan, I note that Mr. Dixon, who appeared before us from the Justice Department, made the point that you are making about the representative character of a community as far as reducing it from a 12-man to a 6-man jury. He makes the point, when he says this: "One point might be worth special mention regarding the effect of going from 12 down to 6 on the juries representative char-

acter in terms of bringing all viewpoints in the community to bear in the trial process. It probably is true that a six-man jury will not be as representative in communities that are highly stratified or ethnically or racially diverse." and then he goes on to say: "However, a jury, after all, is not intended, is not supposed to be a political organ."

I am just trying to understand in my own mind why it would necessarily follow that a six-man jury would not be as representative, if you reduce the number of peremptory challenges, like this bill reduces it down to two. Can you explain that for me? I do not quite understand that.

Mr. MORGAN. Yes. I would like to come at it backward, if I can. First of all, I would also oppose the reduction of peremptory challenges to two. I am interested in the panel they are selected from being fair in the first place and I am, interested. second, in minority participation in juries in the greatest number possible. But, I am, third, also somewhat disturbed about reductions in challenges. If you have got the largest number—I am not a mathematical expert. But, for example, on the peremptory challenges in the case in Mississippi involving the Philadelphia, Miss., murders which was a criminal case where the peremptory challenges, 18 of them, were exercised by defendants associated with the Ku Klux Klan to get rid of blacks on the panel and resulted in an all-white jury of seven women and five men. And, as a result, that was a different kind than the——

Mr. RAILSBACK. Was that Pickens?

Mr. MORGAN. No, that was not Pickens County, which is Alabama. This involved Neshoba County, Miss. You will recall in 1974 three people went to Neshoba County and were killed there. There was a civil rights prosecution in Federal court. Thereafter, the defendants were indicted by an all-white grand jury in the southern district of Mississippi. When the indictments were returned, we entered the case against Federal court Judge Cox and the clerk and jury commissioner to set aside the indictment and to integrate the grand jury. Thereafter, the Federal Government dismissed the indictment. Mr. Doar prosecuted that case, incidentally. But, the peremptory challenges, even if exercised, a person does not actually appear on jury duty, you actually get a different kind of person on the jury because of the challenged person's absence. At least that is the theory. On the mathematics of it, I would leave that or defer to Professor Zeisel, who is a witness coming on, who can provide you the figures far better than I can. With me, if you have 12 folks to draw from, you are much more likely to have somebody from a minority group there. Who do I rely upon for that? Professor Zeisel, who is appearing as a witness, after me.

Mr. RAILSBACK. Do they now reduce the number of peremptory challenges where a Federal court decides, and if the party so stipulates, to reduce the number of jurors?

Mr. MORGAN. I believe they do.

Mr. RAILSBACK. Is that done also by stipulation?

Mr. MORGAN. I think so, yes, sir.

Mr. RAILSBACK. OK. Thank you.

Mr. MORGAN. That is my understanding.

Mr. KASTENMEIER. The gentleman from Maine?

Mr. COHEN. Thank you, Mr. Chairman. I don't have any further questions except perhaps just an observation. I think, Mr. Morgan, you said something to the effect that in your experience the progress of man has been achieved not through judges but through juries. And I would suggest perhaps that the Warren court might stand as a refutation of that particular statement.

Mr. MORGAN. You will notice that I gave that as an exception. From 1954 to 1968 we were very fortunate but that is the only time that I can recall in human history that that is true.

Mr. COHEN. And I would also assume that by your prior experience, at least in the South, that justice was not accomplished by juries?

Mr. MORGAN. Not until we desegregated them, and that is just the way I want to keep them.

Mr. COHEN. Thank you. That is all I have.

Mr. KASTENMEIER. In conclusion, may I ask you: Have you had occasion to practice before a six-person jury?

Mr. MORGAN. No.

Mr. KASTENMEIER. One other question: Your organization, I take it, has still not taken a position on whether or not the three-judge court ought to be abolished?

Mr. MORGAN. No, the organization took an early position that it had no objection to the abolition of the three-judge court. It is a position that I would personally like to have reconsidered and I think it will be probably reconsidered within the organization.

I, personally, and not for the organization, come to the conclusion as a person who has litigated before three-judge courts quite often over the past years, that in civil rights cases they should be retained. They afford the pleader certain options, certain options for a person defending the rights of human beings under the Bill of Rights. And, as an attorney, I would prefer in civil rights cases that they be retained.

Mr. KASTENMEIER. Thank you very much for your testimony this morning, Mr. Morgan.

Mr. MORGAN. Thank you.

Mr. KASTENMEIER. Next the Chair would like to call Mr. Nathaniel Jones, who is the general counsel of the National Association for the Advancement of Colored People.

Mr. Jones, you are most welcome.

TESTIMONY OF NATHANIEL JONES, GENERAL COUNSEL, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; ACCOMPANIED BY CLARENCE MITCHELL, DIRECTOR, WASHINGTON OFFICE, NAACP

Mr. JONES. Thank you.

Mr. KASTENMEIER. We have your statement. It is a brief statement. If you wish, you may proceed from it, or in any event, without objection, it will be put in the record.

[Mr. Jones' prepared statement follows:]

STATEMENT OF NATHANIEL R. JONES, GENERAL COUNSEL, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

I am Nathaniel R. Jones, General Counsel of the National Association for the Advancement of Colored People, with headquarters in New York City. The National Association for the Advancement of Colored People is the largest and

oldest civil rights organization in the nation, with branches in 1,700 communities across America.

In my capacity of General Counsel of the NAACP, I have occasion to deal with the concerns of Negro Americans on a variety of subjects. None is more pressing than the preception of black people of the judicial process, both civil and criminal. For that reason, I am pleased to accept your invitation, Mr. Chairman, to comment on H.R. 8285 and S. 271.

H.R. 8285 is the bill which would amend Title 28, USC, to provide in civil cases for juries of six persons and for two peremptory challenges per party in a civil case or a non-criminal case in which a right to trial by jury is otherwise granted. S. 271 would eliminate three-judge courts in a number of categories, including civil rights cases.

I shall first address myself to H.R. 8285.

The most commonly litigated claim of denial of equal protection of law involves racial discrimination in jury selection.[1] Although these cases involved criminal proceedings, the question of the exclusion of blacks from juries remains a burning question in civil cases. With Negroes' increased mobility, and their greater sophistication more and more are inclined to redress grievances through litigation. With this expanded use of the courts has come greater involvement of blacks as jurors. Paving the way for this participation on civil juries have been the decisions of the Supreme Court outlawing the racial exclusion of persons from juries. The cases of *Avery* v. *Georgia, 345 US 559; Whitus* v. *Georgia, 385 US 545; Swain* v. *Alabama, 380 US 202; Carter* v. *Jury Commission of Green County, 396 US 320;* and *Turner* v. *Fouche 396 US 346,* detail the tremendous hurdles black people have faced in obtaining racially representative juries. Again, these are largely related to criminal proceedings but I emphasize that the exclusionary practices which inhered in criminal trials stubbornly obtain in civil proceedings. Now that juries are becoming more expansive and inclusive in terms of race, we of the NAACP fear that a reduction in the size of juries from 12 to six will undercut this advance and adversely affect the chance of blacks receiving fair treatment.

The NAACP has brought a substantial number of cases in federal courts around the country in which damages are sought for the violations of their civil rights. We have found that one of the most effective curatives in the area of police abuse and other "color of law" excesses is this resort to money damages. Of course when money damages are sought, the defendants are entitled to a trial by jury. By shrinking the jurors to a number of six reduces the likelihood of blacks and other minority group members being made a part of the jury and participation in the deliberation process. This will have direct adverse effect on the administration of justice, and perpetuate the "blue ribbon" perception of juries. Effectively foreclosed would be a number of citizens who are desirous of taking part in the vital job of weighing evidence and dispensing justice.

For these reasons the NAACP opposes H.R. 8285 as being a step backward and legislation which would render meaningless much of the progress that has been made in extending jury service to more citizens. A further concern the NAACP has is the inevitable support this would give to those who desire to tamper with juries in criminal cases. In my view, H.R. 8285 is a forerunner to the total elimination of the jury system in this country.

With respect to S 271, I wish to make a few observations. The NAACP brings and supports a wide variety of civil rights cases in all parts of the country. Many of these cases, be they in the school desegregation area, voting rights or criminal areas, often seek to involve the 3-judge court provisions. It should be noted that these are cases in which vital human rights issues are at stake requiring expeditious resolution. Furthermore, these are cases which often challenge local vested interests and long established policies in communities around the nation. U.S. District Court judges come from these communities and are or have been associated with the architects or perpetuators of the policies under challenge. We have noted, with deep respect, that some judges have stood for justice in the face of strong parochial winds. They have risen above the social and political structures from whence they came. We would be closing our eyes to reality, however, were we not to acknowledge awareness of the process by which many law-

[1] *Fay* v. *New York* 332 U.S. 261 *Hoyt* v. *Florida* 368 U.S. 57; *Witherspoon* v. *Illinois* 391 U.S. 510.

yers are selected for the federal bench. It would be expecting super-human powers on the part of the jurists to expect that an immediate transformation occurs and they suddenly become insensitive to the feelings, inclinations and predilections of those who participated in their elevation to the bench. I make this point in expressing our deep concern over the exclusion of civil rights cases from the three-judge court provisions of S 271.

I am aware of the arguments being advanced in support of steps to relieve the Supreme Court's docket. Moreover, I note that since 1968 civil rights cases have constituted the greater number of 3-judge cases. For instance in 1970, the number was 162 out of 291; 1971, 176 out of 318 and in 1972, 166 out of 310. What these figures say to me, however, is that the 3-judge court is a highly desirable mechanism for dealing with serious constitutional problems facing citizens. Why should a mechanism that is so highly utilized be crippled, or worse, eliminated? Attention must be paid, Mr. Chairman, to the reasons the statistics are what they are. For instance, among the reasons the civil rights cases outnumber the others is that 3-judge courts are more resistant to local influence and the members who constitute the court can thereby deal with the issues with greater concern for the merits and the law.

Further, candor dictates that I remind you of a possible reaction of black Americans to S 271 and any other measure designed to exclude civil rights cases from three-judge court consideration. It will be viewed as one more attempt to change the rules of the game—rules that Negroes have been able to use positively to deal with their adversities. Forcing all civil rights cases before single judges, and then up to courts of appeals may so frustrate Negro litigants that they might well consider abandoning the judicial process as a means of obtaining redress of wrongs. This would be a tragedy, for it was this lack of faith in the judicial system that sparked much of the civil disorders of the sixties.

So concerned was the NAACP by the proposal of Chief Justice Warren E. Burger to eliminate the three-judge court made in a copyrighted interview in the *August 21st* issue of *U.S. News and World Report*, and later in an address before the American Bar Association on August 14, 1972, that Roy Wilkins, our executive director, issued a ringing statement which I will share with you:

"We are alarmed by the suggestion of Chief Justice Warren E. Burger to abolish the three-judge federal court, coming, as it does, at a time when the policy of the National Administration is to urge delays of federal court orders in school desegregation cases. Such delays hurt black Americans.

The three-judge federal court statute has been a principal vehicle on which minorities have resisted oppressive state legislative and administrative actions. That the Supreme Court case load has increased under that statute is not a reason to condemn it. Rather, this increase speaks eloquently of the extent of the failure of states to honor, and in some cases, to abridge the constitutional rights of minorities."

Mr. Chairman, I trust that these concerns will cause your committee to take pause and agree with us that this legislation, rather than improve judicial machinery, will have a stifling effect.

Mr. JONES. Thank you, Mr. Chairman, and members of the committee.

I am Nathaniel R. Jones, General Counsel of the National Association for the Advancement of Colored People, with headquarters in New York City. The National Association for the Advancement of Colored People is the largest and oldest civil rights organization in the Nation, with branches in 1,700 communities across America.

Mr. KASTENMEIER. Incidentally, perhaps I should also observe, Mr. Jones, that with us this morning is an old friend of the committee, Mr. Clarence Mitchell of your organization.

Mr. JONES. Of whom we are extremely proud.

In my capacity of General Counsel of the NAACP, I have occasion to deal with the concerns of Negro Americans on a variety of subjects. None is more pressing than the perception of black people of the judicial process, both civil and criminal. For that reason, I am pleased to accept your invitation, Mr. Chairman, to comment on H.R. 8285 and S. 271.

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For these reasons the NAACP opposes H.R. 8285 as being a step backward and legislation which would render meaningless much of the progress that has been made in extending jury service to more citizens. A further concern the NAACP has is the inevitable support this would give to those who desire to tamper with juries in criminal cases. In my view, H.R. 3285 is a forerunner to the total elimination of the jury system in this country.

With respect to S. 271, I wish to make a few observations. The NAACP brings and supports a wide variety of civil rights cases in all parts of the country. Many of these cases, in the school desegregation area, voting rights or criminal areas, often seek to involve the three-judge court provisions. It should be noted that these are

cases in which vital human rights issues are at stake requiring expeditious resolution. Furthermore, these are cases which often challenge local vested interests and long established policies in communities around the Nation. U.S. District Court judges, as we know, come from these communities and are or have been associated with the architects or perpetuators of the policies under challenge. We have noted on many occasions, with deep respect I might add, with deep appreciation, that some judges have stood for justice in the face of strong parochial winds. They have risen above the social and political structures from whence they came. We would be closing our eyes to reality, however, were we not to acknowledge awareness of the process by which many lawyers are selected for the Federal bench. It would be expecting super-human powers on the part of jurists to expect that an immediate transformation occurs and they suddenly become insensitive to the feelings, inclinations, and predilections of those who participated in their elevation to the bench. I make this point in expressing our deep concern over the exclusion of civil rights cases from the three-judge court provisions of S. 271.

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Mr. KASTENMEIER. Mr. Jones, may I interrupt you at this point?

Is not the forum of the three-judge court mandatory for those cases?

Mr. JONES. It all depends. It depends on whether a statute or a Federal or State statute is being attacked.

Mr. KASTENMEIER. If it is, it is mandatory?

Mr. JONES. If the District Judge to whom the case is presented feels that it is a proper case for invocation of the three-judge court, he then consults the chief judge of the Circuit. And if the chief judge of the Circuit concurs, he will impanel a three-judge court. A District Court does have some discretion in determining whether the issue is a proper one for the three-judge court.

Mr. KASTENMEIER. The point that I am inquiring about is that it is not really at the option of the litigant? It is not a free choice whether the litigant in a civil rights case goes to a three-judge court or not?

Mr. JONES. Well, I think to this extent it would be, Mr. Chairman, the pleader, the drafter, the lawyer can, if he is experienced in the civil rights area, fashion his pleading in such a way as to make it a proper matter for a three-judge court or he can draft it along other lines which would make it a proper matter for a single judge to handle. I think to that extent he can control, in a substantial way, that determination.

Mr. KASTENMEIER. I will follow up this question later. Thank you.

Mr. JONES. All right.

As I was saying, in our view, these figures lead to the conclusion that this is a highly desirable mechanism for dealing with the civil

rights problems. And so we ask, why should a mechanism that is so highly utilized be crippled, or worse, eliminated? Attention must be paid, Mr. Chairman, to the reasons the statistics are what they are. For instance, among the reasons the civil rights cases outnumber the others is that three-judge courts, as many lawyers know, are more resistant to local influence and the members who constitute the court can thereby deal with the issues with greater concern for the merits and the law.

Further, candor dictates that I remind you of a possible reaction of black Americans to S. 271 and any other measure designed to exclude civil rights cases from three-judge court consideration. It will be viewed as one more attempt to change the rules of the game—rules that Negroes have been able to use positively to deal with their adversities. Forcing all civil rights cases before single judges, and then up to courts of appeal may so frustrate Negro litigants that they might well consider abandoning the judicial process as a means of obtaining redress of wrongs. This would be a tragedy, for it was this lack of faith in the judicial system that sparked much of the civil disorders of the sixties.

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Mr. Chairman, I trust that these concerns that I have expressed and those contained in the quotation that I have shared with you from Mr. Wilkins will cause your committee to take pause and agree with us that this legislation, rather than improve judicial machinery, will have a stifling effect.

Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Jones.

When did your organization take a position on both of these matters? Has it been recently or has it been a position held by your organization for some time?

Mr. JONES. It has been a consistent position.

Mr. KASTENMEIER. One of the reasons I asked is that earlier the Civil Rights Commission had no objection to the abolition of the three-judge court and presumably it would reflect the view of minorities and particularly the view of, I should think, of black people. I personally wonder to what extent these have been perceived, both of these measures, as possibly compromising the judicial system as regards the rights of black Americans. Do you know why? Are you

aware of why the Civil Rights Commission would not have opposed the abolition of the three-judge court, as well as the NAACP?

Mr. Jones. No, I am not, Mr. Chairman. I have been the general counsel of the NAACP since 1969, and at no time, during that period of time did the Civil Rights Commission consult with our organization with respect to our views on these two matters. I am not aware of the date or the period of time in which the Commission took its position but I think one of the reasons that we are so sensitive on this issues, as reflected in Mr. Wilkins' statement, is that with the change in the policy of the national administration in 1969, we felt that we were being beseiged, and that the rules were being changed all around us. As it was, we have a national administration instead of coming in on the side of plaintiffs seeking desegregation of schools, and those who were interested in advancing the interests of minorities, we were suddenly confronted with hostility, and so that caused us to become increasingly concerned and defensive about any measures that would be an incursion and invade the opportunities we have in protecting and advancing our rights.

Mr. Kastenmeier. Speaking for myself, and I think certainly the majority of the members of this subcommittee on both sides, if we were convinced that these changes would be detrimental to the rights of black Americans, or any Americans, we would certainly not want to approve them. Part of our dilemma at this point is whether opposition is based on suspicion or fears of what might happen rather than the proven case that the changes would be detrimental to any group of Americans. I am not sure it can be demonstrated one way or the other. But, I did want to share with you my feelings that the question really is, is this merely a suspicion that certain things could happen but probably won't, and accordingly, we must respond to that or whether demonstrably, rights of people are compromised by these changes. And, as I say, that is the major question.

Mr. Jones. Well, I can understand, Mr. Chairman, but let me say, and it is quite difficult, I guess, to transmit these concerns with the real feeling that we have. Let's take the jury proposition. We have a network of lawyers all across the country who are involved in civil rights cases. We are always urging the use of the judicial route as a means of solving problems. If we get a complaint from California or from Ohio, from Mississippi, about a police officer who cracked somebody over the head; who inflicted brutality upon a person, who falsely arrested an individual under color of law, rather than have big protest meetings, and going into the streets, we say, use section 1983, go into Federal court and sue, get some damages, hit them in the pocketbook because this is the real effective remedy. So, we are doing more and more of this. We are getting damage awards in many cases. But, if when you start succeeding in that area, going down that road, you are suddenly faced with a reduction in the size of the juries.

We do not have the mathematical formulations that may convince you that this would result, but from any of us who have tried cases in a Federal district court we know that if you shrink the source, with all of the means available to opposing counsel, it is not very difficult to strike from the jury a black member or a sympathetic member. That reduces your chance of having black and sympathetic

input in the jury deliberations. I am a former assistant U.S. attorney. I was in the northern district of Ohio for 6 years. During that time we had the key man system. I know how important it is to have minorities on the panel. And if you start with a panel of 36, and you select 12 out of that panel, you may have 3 blacks. You can, through a number of means—they can be stricken, they can be moved aside and you come up with an all-white jury. And if you are talking about a section 1983 case where you are suing a sheriff or police officer, it is a fairly simple matter if you reduce it to six, to use two peremptory challenges, to remove a substantial threat.

So, we are very concerned by any institutionalizing, any procedure whereby the supply, the source is going to be reduced, cut in half, because we think that this is going to not only—even if it didn't in fact effect the outcome of a proceeding, the perception of what is going on is going to be very damaging. And one of the things we are constantly fighting in the NAACP is to try to keep people's faith alive in the judicial process, the judicial route, because we know what the alternatives are, how destructive they are. And we think we are making some inroads now, even with a lot of our young people and getting them to use the courts as a means of redressing their wrongs.

Mr. MITCHELL. Mr. Chairman, could I identify myself for the record?

Mr. KASTENMEIER. Mr. Mitchell?

Mr. MITCHELL. Clarence Mitchell, director of the Washington bureau of the NAACP, and mention something with respect to two of the points you raise. You raise the question of whether, under the civil rights statute, the three-judge court would be mandatory. They are not mandatory; it is permitted in some instances that you could have access to the three-judge court and in some cases as in the Voting Rights Act, the district court for the District of Columbia is the designated forum in which the litigation begins. But, as I understand the thrust of this bill, it would eliminate the three-judge courts, per se., which means that even if the statute provided that you have access to them, you could not get in.

Then with respect to the question of our concern about these things, there are just so many proposals coming up now that it is incredible what the thread is to the procedures that black citizens have used to protect their constitutional rights. For example, there is a proposal which would require, and originating with the Chief Justice which would require that before lawyers could practice in trials representing clients, they would have to be subjected to certain kinds of additional scrutiny. And there is no doubt in our mind that the scrutinizers would be the very people who are the ones who have always discriminated against us from even getting into law schools.

Now, there has been a deluge of these things, so that while we have a broad reaction against them, it is almost like trying to take up arms against a sea of troubles by opposing all and by opposing all who try to end them all. Well, you just have to go from day to day in attacking what is the most imminently dangerous and, in this case, while in the proper time we will be attacking all of these other things, like putting an intermediary court between the Supreme Court and the Court of Appeals, as somebody has suggested, we are going to attack that, too. But these we have to take in order and the fact that we only now are

here does not indicate that we have not been concerned. It is often the question of whether you think a bill has a real chance of passage.

I might say with respect to the Civil Rights Commission, we often find ourselves in disagreement with them and, happily, we have come out ahead. As you may remember, when we were working on the equal employment opportunity amendments in 1972 in the House, the spokesman for the Civil Service Commission said that he did not think that the Federal agency should be covered by the law, and we disagreed vigorously. Fortunately, the chairman of the Commission later came back and indicated he was on our side.

Mr. DRINAN. Mr. Chairman, could I interject there, because I think this is very relevant, that the U.S. Commission on Civil Rights has changed its position. And I have a document here and, unfortunately, I did not get this to the chairman here in time, but I have a long letter under date of December 18, 1973, from John A. Buggs, staff director, of the U.S. Commission on Civil Rights and I think if I may I would like to submit this for the record.

Mr. KASTENMEIER. Without objection, that will be received for the record.

[The letter referred to follows:]

U.S. COMMISSION ON CIVIL RIGHTS,
Washington, D.C., December 18, 1973.

HON. ROBERT F. DRINAN,
224 Cannon House Office Building,
Washington, D.C.

DEAR FATHER DRINAN: This is in response to your recent letter regarding the position of the Commission on Civil Rights with respect to S. 271, the Three Judge Courts Act, and H.R. 8285 which would reduce the number of jurors in civil cases and reduce the number of peremptory challenges available to the litigating parties. The Commission on Civil Rights has no official position on either S. 271 or H.R. 8285, however, we are concerned about the civil rights implications of the Three Judge Courts Act.

In 1971 the Commission expressed its view to the then Judiciary Committee Chairman Emmanuel Celler that the advantages and disadvantages of H.R. 3805 (a predecessor to S. 271 introduced in the 92nd Congress), from a civil rights point of view, generally offset each other. Since that time our General Counsel John H. Powell, Jr. has reviewed the situation and has recommended otherwise. His views, with which I agree, were submitted to Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia at the Judge's request. They are set out below and are offered for your information in considering S. 271.

By repealing 28 U.S.C. 2281 and 2282 and by amending 28 U.S.C. 2284, S. 271 would retain the requirement of a three-judge court only when "otherwise required" by an Act of Congress or when a state or Federal apportionment law is involved. If similar legislation is passed by the House, a three-judge court will be unavailable in many civil rights cases which challenge state or Federal laws upon the ground of unconstitutionality. Of course, the limited number of cases brought under certain sections of the Voting Rights Act (sections 4(a), 5, and 10(c)) and the Civil Rights Act of 1964 (sections 101(h), 206(b), and 707(b)) will be unaffected because these Acts contain provisions under which three-judge courts are, in fact, "otherwise required."

S. 271 has the backing of the Judicial Conference and Chief Justice Burger has spoken out in favor of similar legislation (although principally because of his concern that the Supreme Court spends too much of its time reviewing three-judge court cases since they may be appealed directly to that Court). We have also noted that Professor Charles Alan Wright of the University of Texas in his testimony before a subcommittee of the Senate Judiciary Committee on an identical bill stated:

"If there is any informed opinion that today favors retention of the three-judge court, I am unaware of it." (*Hearings on S. 1786 before the Subcommittee on Improvement in Judicial Machinery*, 92nd Cong., 2d. Sess., pt. 2 at 773 (1972).

Contrary to Professor Wright's statement, however, "informed opinion" among much of the civil rights bar favors retention of the three-judge court.

The advantages of the three-judge court are most manifest in highly controversial situation—e.g., where state statutes involving racial issues, such as an antibusing law, are challenged. The time has long passed since such statutes, on their face, can be said to be unconstitutional. Laws no longer are drafted so that color lines are obvious. When a statute is subjected to a constitutional challenge, therefore, courts are almost always obliged to look beyond seemingly neutral criteria contained in the law and to examine its actual impact in the context of the legislative history involved. This kind of analysis necessarily involves many factual and judgmental considerations. A single judge confronted by such a controversial statute is less likely than two or three judges to find the facts and make the judgments which would subject him to hostile public opinion. It is a simple fact of human nature that in numbers there is strength and judges, despite the protection of the judicial robe, are no less human than the rest of us.

In addition, because of its inherent prestige, the input of two additional minds and the presence of at least one circuit court judge, the decision of a three-judge court carries greater legal and moral authority than the decision of a single judge. Accordingly, it is more likely that three-judge court orders in controversial cases will be voluntarily complied with and on the whole better accepted by whichever side loses.

Another advantage of the three-judge court is that the presence of two additional judges makes for a "nationally sensitive tribunal" more attuned to viewing civil rights concerns in the context of national, as opposed to parochial, interests. See Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 Yale L.J. 1646, 1654 (1963). The analysis advanced in this Yale Law Review note posits that a single district court judge, due to his or her participation in the formation of state law (and, one might add, frequent contact with local public officials), might tend to give undue weight to the narrow interests of the state in which he or she sits. This tendency towards parochialism can be compensated by the two other judges, at least one of whom is a circuit court judge, likely to have a broader perspective. The advantages of a "nationally sensitive tribunal" capable of expounding constitutional requirements in the face of local pressures are obvious.

This more even-handed approach of three-judge courts is likely to appear not only in the substantive parts of cases, but also in procedural and evidentiary aspects as well. Although incorrect procedural rulings can be corrected on appeal, initial losses on important procedural motions can be extremely damaging to the posture of a civil rights case and to the political movement which generated it. There are also discretionary decisions—e.g., rulings on evidence critical to building a record and on the timing of what the court will hear and do—which in reality can't be corrected on appeal and which can determine the outcome of the case.

It is true that three-judge court cases are slower than single judge cases. Where time is of essence, single judge courts, therefore, are desirable. However, in nearly all civil rights cases involving constitutional challenges to state or federal law, issues can be framed and pleadings can be drawn at the litigant's option to require or not to require a three-judge court. Thus, where speed is deemed more important than the various advantages of three-judge courts, pleadings which do not require a three-judge court can be filed.

In sum, the major benefit of the availability of a three-judge court is that such courts increase the chances of the civil rights litigant not only to obtain favorable decisions in controversial cases but also to have those decisions complied with.

Further cause for opposing this legislation lies in the insufficiency of the four reasons advanced for the enactment of this legislation as set forth in the Report of the Senate Judiciary Committee accompanying S. 271 (S. Rep. No. 93-206, 93d Cong. 1st Sess. (1973)). First, the Report concludes, the Bill is necessary to relieve the "considerable strain on the workload" of the Federal district and circuit courts which the increasing number of three-judge court cases has created (the number of such cases has almost tripled in the last ten years). By reducing this number, the time and energy of the two other judges could be used in handling the regular docket.

While it is true that there has been a marked increase in the number of three-judge court hearings since 1963, this number appears to have levelled off in the past three years. In fact in 1972 there was a *decline* in the number of three-judge

court cases. Because the statistics for 1973 are not now available, it is of course impossible to know whether the burden these cases impose upon the judiciary has hit its heaviest. However, even if the frequency of three-judge court hearings has not peaked, the way to ease this judicial burden is not by leaving the baggage on the train but by getting more porters. If the need for these additional judges causes a strain on the judiciary, the Congressional solution should be the appointment of more judges, not the denial of the extra judicial care and consideration that three-judge court cases merit. The cases in which three-judge courts are convened are precisely the cases in which this Nation should maximize its use of judicial manpower.

The second reason for the need for S. 271 noted in the Report is that because there are "jurisdictional uncertainties" with respect to the decision to invoke a three-judge court and with respect to appellate review of such decisions, three-judge court cases often lead to uncertain results and generate litigation over procedural aspects, thereby requiring still more judicial time. It is true that there are "jurisdictional uncertainties" in the current law (David P. Currie stated in 1964: "The existing three-judge statutes are in a mess." Currie, *Three-Judge District Courts in Constitutional Legislation*, 32 U. Chi. L. Rev. 1, 78 (1964). However, the solution to this problem lies in definitive judicial clarification of proper procedure—a process which has been going on over the years since Currie's article. Alternatively, the statutes could be rewritten to handle specific procedural problems (e.g., the rights of direct appeal to the Supreme Court could be deleted from the law). In short, it is possible to use a scalpel instead of an axe to remedy the defects in the current law. The argument for the use of this more refined technique is even more compelling if the percentage of three-judge court cases which become entangled in these "jurisdictional uncertainties" is small. The Report, unfortunately, is silent with respect to this potentially important point.

Another argument raised is based on the fact that the original rationale for the three-judge court is no longer relevant at this time. The predecessor of 28 U.S.C. 2284, enacted in 1910 as part of the reform legislation of that era, was intended to reduce the Federal judiciary's tendency to obstruct progressive state legislation through *ex parte* injunctions. The thinking was that three judges would be less likely than one to enjoin imprudently state regulatory programs. Given various subsequent procedural statutes limiting the ability of Federal courts to interfere precipitously in state affairs, there is no longer any need, say the authors of the Report, for protecting against such actions by Federal judges. This argument, however, is simply unconvincing. A new need and hence a new rationale—the one advanced at the outset of this letter—has replaced the old one: to protect against imprudent judicial decisions *to refrain* from taking action.

Finally, the Report asserts, court rulings have so restricted the situations in which Federal courts are permitted to issue injunctions restraining enforcement of state law that this decisional law is an adequate safeguard against reckless injunction actions by Federal judges. The report cites the principle of "abstention" and a recent decision (*Younger* v. *Harris*, 401 U.S. 37 (1971)) preventing injunctions of pending state criminal prosecutions except in special circumstances. This argument, of course, cuts two ways and can be used against the bill. The development to which it refers illustrates the ability of the judiciary to respond wisely to such problems and to control itself without the kind of aid or direction from Congress that S. 271 presupposes the courts need.

I trust that you will find this useful. If you wish further assistance, please have a member of your staff contact me or Bud Blakey (254-6626).

Sincerely,

JOHN A. BUGGS,
Staff Director.

Mr. KASTENMEIER. I am sorry, however, that the Commission did not address itself to the committee as a whole in attempting to correct its position.

Mr. DRINAN. Well, I know that I wrote after Judge Skelly Wright was here, and as a matter of fact, he wrote himself and this was a report that was submitted to Judge Skelly Wright at the judge's request, and these views are set out, are all set forth below where in 1971,

the U.S. Commission on Civil Rights expressed its view to the Judiciary Committee on the advantages and disadvantages of the predecessor bill of S. 271. From the civil rights point of view these generally offset each other, but since that time their general counsel has reviewed the situation and recommended otherwise, and he sets forth here very persuasive reasons, it seems to me why this bill should not be enacted. And I have not heard from Judge Skelly Wright as to whether or not this is sufficient for him to reverse his position, the position which he gave here in October.

Mr. KASTENMEIER. At this time, I would like to yield to the gentleman from Illinois, who must leave shortly.

Mr. Railsback?

Mr. RAILSBACK. I want to just say, personally, that I commend the NAACP for what I think is a rather rational, restrained position on the impeachment inquiry. I wish the ACLU was still around, and I hope that those of us who have to sit in judgment on this rather difficult issue are able to resist pressures from all of the various pressure groups, including the new groups that are forming to back the President. In other words, it seems to me that what we are trying to do is get the truth, and we have got to weigh the evidence. And I, for one, really appreciate the NAACP's position as I understand it.

Let me just point out real quickly that the three-judge court bill does not really affect those statutes that relate to the Civil Rights Act of 1964 or the Voting Rights Act of 1965 and the various sections that deal with racial discrimination. There are some civil rights that may be affected by this legislation. Now, what has happened is Chairman Kastenmeier has sought an explanation from the Director of the Administrative Office of the U.S. Courts, Mr. Roland Kirks, who replied to a request that was sent to him under date of October 10, 1973, in a letter of October 30, 1973, which, Mr. Chairman, I would ask be included as a part of our hearing record, if that can be done.

Mr. KASTENMEIER. Yes. As a matter of fact, I indicated at the outset that two statements would be made a part of the record. That was one and the letter from Prof. Anthony Amsterdam was the other.

Mr. RAILSBACK. The reason I bring this up, I think there has been some misunderstanding about the effect of this bill. According to Mr. Kirks in his letter he said:

> From the appendices it can be seen that litigants which seek an injunction and have their cases heard by three-judge courts cite not only 28 U.S.C. 2281 and 2282, but many cite 42 U.S.C. 1983 and 28 U.S.C. 1343, as well, and a few cite various amendments to the U.S. Constitution and State statutes or constitutions. You will note that in 1972 and 1973 of the 349 total civil rights cases heard by three-judge courts, only 2 involved an allegation dealing with racial discrimination. There was one case arising in southern Texas in 1972, and one case arising in Connecticut in 1973.

In other words, what I gather he is saying and he has attached this information in his appendixes is that out of those total 349 cases there were really only 2 that dealt with the case of racial discrimination. I personally would feel that we could reach some kind of a compromise to see that those cases that you are most concerned about would perhaps be excluded but I think you ought to take a look at that and see if he is accurate in his assessment.

Mr. MITCHELL. Mr. Railsback, I do not think you should leave to chance this question. As you know, under the House rules when you

amend the statute, you are required to say how the statute is affected in specific language when the bill gets back to the floor.

Mr. RAILSBACK. Yes.

Mr. MITCHELL. I am always very wary of bills which talk about repealing or amending this particular section and then there is no explanation as to what it does. The fact that he has to send this letter is an indication that probably some of those who are pushing it do not know what it does, and I feel that if we are going to have adequate protection of these things, we ought to say specifically, in language not just by referring to the section, in language what we are trying to do and what we are not trying to do. I would say that it is within the genius of most State legislatures to take almost any kind of a law which gives them an escape hatch and write something that would do us in. Our recourse then, is, of course, to a three-judge court and I would not like to see any vagueness about what is the intention of these things.

Mr. RAILSBACK. Yes, and I agree with the statetment that you just made.

Let me give you an example, though, of why I think we do not probably want to deal with all of the cases under the civil rights heading that Mr. Kirks has listed in his appendices. In other words, I can see why Judge Skelly Wright would come before us and say you do not need three-judge courts in some of these cases. Here are some of the cases we are talking about:

Abortion laws, assistance to nonpublic schools, education for the handicapped, employment, expelling students, housing, obscenity, prejudgment attachment, seizure of property without notice, penal codes, sobriety tests, taxing, and racial security cases. In other words, what we have to do in drafting this legislation or perhaps redrafting it is, to probably spell that out very definitively what is not exempted from the three-judge court.

Mr. MITCHELL. Well, in your list you have assistance to nonpublic schools. That is dynamite with us because the legislators usually pass laws to circumvent desegregation of public schools by making assistance available to private schools. And this is a perfect case to go to a three-judge court yet they are including it in the list of exceptions.

Mr. RAILSBACK. Well, they say—and I have not had a chance to check this—but they say there are only two cases where there have been charges of racial discrimination. Now, I find that a little bit difficult to understand when you see some of these other headings. But, I think what we have to do is analyze how accurate his assessment is that there are only 2 cases involving racial discrimination out of a total 349.

I am sorry but I have to leave because I have a commitment at 11:30. My other question is on the six-person civil jury, this reducing it to the six-man-size jury. I think that it is going to be particularly important to make a case one way or the other. First of all, this, as I understand it, deals only with civil cases. It would not apply to criminal cases. The second thing is that I think there is going to have to be a case made that by reducing it from the 12 to the 6, you somehow are decreasing the opportunity for fair representation of minority groups. There are many lawyers who feel that you get about the same result even with the 6-person jury instead of the 12-person jury. I for one would be concerned if there is a case made that this is somehow going

to hamper the progress that has been made in increasing the fairness of representation of say minority groups. I guess Professor Zeisel is going to address himself to that. I am sorry, but I have to leave but I wanted to make those points.

Mr. MITCHELL. Before you go, I would like just to say with respect to your opening observation about your position on impeachment. I happen to be one who was in agreement with the opposition on impeachment, and roughly it boils down to this: That after the many years in which we have seen black people denied due process because of cases being tried on the basis of newspaper publicity, radio or television, et cetera, and we have seen grand juries lobbied by various forces that wanted to intervene in the secrecy of the grand jury room, we have come to the conclusion that everybody is entitled to due process, and we feel the President of the United States is just as entitled to due process as the humblest black man that is before an all white, prejudiced jury in the State of Mississippi.

Mr. RAILSBACK. Well, that sounds very logical to me.

Mr. MITCHELL. We hope the country will agree with that.

Mr. DRINAN. Mr. Chairman, the ACLU so holds so holds. Mr. Mitchell, too, and they have a different position. So, that is not inconsistent.

The CHAIRMAN. The gentleman from Maine?

Mr. COHEN. I have no questions.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan?

Mr. DRINAN. Would you explain the point that is set by the Administrative Office of the U.S. Courts? It says here in this material Mr. Railsback was quoting from: "You will note that in 1972 and 1973 of the 349 total civil rights cases heard by 3-judge courts, only 2 involved an allegation dealing with racial discrimination."

Mr. JONES. I find that extremely difficult to accept. I know the cases in which we have made the allegation far exceed that number.

Mr. DRINAN. Well, we do have a breakdown here, fiscal years 1972 and 1973, and in one year it was 166 and the second year it was 183. And they break them down and they say that the two cases involving racial discrimination involved one arising in southern Texas in 1972, and one case arising in Connecticut in 1973. We have this material and I just want your comment on it because looking through all of these separate category, I cannot find a case frankly, where there is racial discrimination except in these two instances.

Mr. JONES. I would not be able to explain the information that the Administrative Office came up with. It does not square with what we know to be the situation.

Mr. DRINAN. Well I think, sir, if I may, Mr. Chairman, I would suggest that you take this material, which I think will go into the record and that I would suggest that you specifically rebut that because Mr. Roland Kirks, the Administrative Office of the U.S. Courts, has the whole breakdown here and that is what he concludes. So, I think to buttress your case, you should say that it is, in fact, used in more instances.

Now, in the position of the U.S. Commission on Civil Rights, Mr. John Buggs says this, that the number of three-judge Federal courts, is, in fact, declining. Would you feel that that is so in the civil rights area, that the number has been edging downward?

Mr. JONES. I would say that in the last year, last couple of years, that that may be so. But, nevertheless, we still feel that the realization that persons can go to the three-judge court, and expect fairly rapid resolution of the issue by direct appeal to the Supreme Court, is extremely meaningful. And as I attempted to point out in my statement, it has a very salutary effect to know that there are three judges and those of us who have dealt with some of our district judges knowhow arbitrary and difficult a single judge can be. And he usually does not take that position when he is working in tandem with two other members of a panel.

Mr. DRINAN. Well, over the holidays a very good Federal judge lobbied me on this, and he is a very liberal and progressive person and I am sure that he is a civil rights person, but he felt very strongly that the Congress should move on this area, and he was quoting Judge Skelly Wright, who as everyone knows, has a superb record in this area. I am just baffled, frankly, how the administrative conference came to this conclusion and how Skelly Wright came before us in October and how the U.S. Commission on Civil Rights has reversed its position. And can you explain the background of how these people who are not biased, have come to that conclusion and have lobbied strongly for it?

Mr. JONES. Well, I find it difficult to explain their rationale. It seems to me that these are people, Judge Skelly and others, who are extremely fair, liberal and decent. And they have perhaps some reason to think that the type of justice they dispense can be received at the hands of other judges. And this just isn't so. Judge Skelly Wright is an exception. He is a tower. And there just are not many Skelly Wrights around.

Mr. MITCHELL. I think, Mr. Drinan, that the question depends whether you are on the elephant's back or under his foot. In this kind of a situation I have been amazed at the prospective of good people who look at the needs to improve judiciary machinery, selection of counsel, admission to schools of laws, which looks good on paper but when you get out in police court, as some of us have to do or when you get out in a prejudiced county where we have got a jury loaded against us as some of us have to do, it is a different thing. And, I, too, was a little bit surprised that Judge Skelly Wright was the person who presented the case. But, I assume that some people know something about politics in the judicial conference and they decided that they would get their best man who would prevent the civil rights groups from being alerted to hazardous possibilities. I do not mean to infer that Judge Wright was a party to that but if I had been making a selection of a spokesman and was in the position of those who selected him, he would have been my man. And I just say they do not see this thing as we see it, who have to live with it every day.

Mr. DRINAN. Well, I think you made some points here that, frankly, are not responded to in the testimony that we have had to date. And Judge Skelly Wright indicates that in his judgment, and he quotes statistics here, that the original purpose for which the three-judge Federal court was created no longer obtains, and that those reasons have passed into history. And he makes out a very good case. And if I may, I would suggest that you go back to his testimony which was

given here in October, and take it point by point and show where he is in error because, obviously, you suggested, he has persuasive powers because of his background and I was prepared, frankly, to accept his testimony until I began to think of it and then talked with somebody at the ACLU, and they said that it is by no means settled in the civil rights or civil liberties community.

Mr. MITCHELL. Well, what I would like to remind you, Congressman Drinan, is of this fact: There are a lot of perfectionists wandering around the country these days, who talk about all kinds of wonderful reforms and some of them are very good people. And when you talk about the historical origin of a statute, I would say it is quite possible that nobody contemplated at the time the fifth amendment was added to the Constitution, the uses to which the fifth amendment might be put. And I daresay at the time the three-judge court statute was passed, nobody contemplated how much value it would be to civil rights. But, certainly there is no justification for calling for the abolition and repeal of that statute simply because the original purpose is no longer the purpose for which it is used, but purposes which are permitted under the statute which have vastly constructive results of being used. And, frankly, I do not think that the assertion that he has made merits an answer.

I think the brutality and the deprivation of rights, the actions of the State legislatures which have abused our people and used our tax money to do it and forced us into the three-judge courts are the things that everybody ought to be looking at now, and not some ethetary historical purpose or some way to keep judges from not having to earn their pay by having a nice, leisurely life like they used to do when I was young, you know. They could go home, and go to Maine for vacations, and that kind of thing. But, now, they have to work and I think if they don't want to work then they ought to get off of the bench.

Mr. DRINAN. If you could persuade Judge Skelly Wright to confess errors, I would be happy. When my ears hear something like you and Judge Skelly Wright are on different sides I get very confused.

Mr. MITCHELL. I think in an area of confusion, it might be well to let the status quo remain.

Mr. DRINAN. Thank you.

Mr. KASTENMEIER. Thank you. I would just comment that it seems strange to have the ACLU and the NAACP oppose a change across-the-board and express a desire to keep things as they are.

Mr. MITCHELL. It does not seem strange when it is a question of whether you want to have a situation which permits you to live. We want to maintain the status quo in this country that permits people to breathe and permits people to eat; permits people to send their children to schools, and live in decent homes. We want to preserve that but, this is a recommendation which would take away from those fundamental rights.

Mr. KASTENMEIER. I understand your position.

The gentleman from Maine?

Mr. COHEN. I wonder if I could raise a question not directly pertaining to this legislation, but with reference to a statement you made, Mr. Mitchell, about your organization also opposing any attempt to place some sort of intervention, a group between the Supreme Court and the appeals court in order to screen the volume of cases on appeal

and that your organization in all probability would oppose that. I was just wondering, because the whole thrust of the testimony this morning is not so much directed, or not entirely directed to minority groups, but to the principle of the diminution or dilution of the 12-man jury, and what its societal implications are. And, the jury system has come under attack in recent years and we have other legislation pending, such as no-fault insurance, for example, and I am wondering whether you or your organization might view that type of legislation again as an assault upon the jury system, in that we are becoming more preoccupied with economy and efficiency as opposed to extending to every man his civil rights, as such?

Mr. MITCHELL. Well, the whole thrust of the no-fault insurance question is to try to avoid needless litigation and the interest of seeing to it that the plaintiff and the parties involved in the case get speedy and fair solution. Now, the trial lawyers, of course, who make C's out of this are against that. But, we, as an organization, think it is a good idea.

Mr. COHEN. Just let me raise the question, because I know a number of people are now starting to question as to whether it may be discriminatory against poor people, and I assume blacks would fall in that category in many cases, if they start addressing threshold limitations, such as you have to have $500 worth of medical expenses before you can sue for pain and suffering, and you might find some black people may be excluded from bringing lawsuits.

Mr. MITCHELL. Mr. Jones reminds me that you refer to a part of the Illinois statute which was ruled unconstitutional. We made a very careful study of no-fault and did submit a report on that in our recent January board meeting and we adopted the report, so that——

Mr. COHEN. I would like to have a copy.

Mr. MITCHELL. I will be glad to send you one.

Mr. COHEN. That is all I have, Mr. Chairman.

Mr. KASTENMEIER. Let me extend our thanks for your appearing this morning, Mr. Jones and Mr. Mitchell.

Mr. JONES. Thank you for the invitation.

Mr. MITCHELL. Thank you.

Mr. KASTENMEIER. Our last witness this morning is Prof. Hans Zeisel, University of Chicago Law School.

Professor Zeisel, you are most welcome, and we are pleased to have you. We have your statement which you may proceed from if you wish, or you may proceed in any way you wish.

TESTIMONY OF PROF. HANS ZEISEL, PROFESSOR OF LAW, UNIVERSITY OF CHICAGO LAW SCHOOL

Mr. KASTENMEIER. Without objection, your statement as a whole will appear in the record.

[Professor Zeisel's statement follows:]

TESTIMONY BY PROFESSOR HANS ZEISEL

Concerning H.R. 8285 that would replace the 12-member juries in civil cases in the federal courts by juries of 6.

1. My name is Hans Zeisel. I am emeritus Professor of Law and Sociology at the University of Chicago Law School. I am Director of Research of the Vera Institute of Justice and Consultant to the American Bar Foundation. With my

colleague, Harry Kalven, Jr., I am author of *The American Jury*, the standard work on our jury system.[1] More recently, I have followed the various proposals and court decisions designed to reform the jury system, particularly with respect to the unanimity rule and the reduction of the jury size from 12 to 6.[2]

2. The argument for reducing the size of the jury from 12 to 6 is twofold. (1) Such a move would save money and allegedly time. (2) Such a reduction would not interfere with the quality of justice, because there is no difference between the verdicts of 12-member and 6-member juries.

3. As to saving money, the case is clear enough: It has been estimated that in the federal system, with its relatively high per diem rate of $20, reducing all juries from 12 to 6 would save about four million dollars. This is a substantial sum; still it is only a little more than 2 percent of the total federal judicial budget and a little more than the thousandth part of one percent of the total federal budget.

4. As to the amount of time saved, the best estimates arrive at a negligible quantity, primarily because the voir-dire proceedings are not markedly affected by the reduction. In most federal courts, the core of voir-dire questioning is done by the judge simultaneously for all jurors, and it makes little difference whether 12 or 6 jurors listen and answer. Nevertheless, a minor, insignificant amount of time might well be saved at the voir-dire level.

5. There is no hard evidence that the 6-member jury would deliberate less than the 12-member jury. And if it turned out to do that, it would be doubtful whether this shortening should be entered on the credit side of the proposed reform.

6. As to whether adjudication by a 6-member jury is the same as by a 12-member jury, the U.S. Supreme Court has said twice that the evidence before the Court showed that there is no difference between the verdicts of a 12-member jury and those of a 6-member jury. With all due respect to the judges who composed the majority of the Court in these cases—on this point they were simply wrong. The Court's so-called evidence proved nothing of the sort. Moreover, there is good evidence indicating that the reduction from 12 to 6 will affect the verdicts.[3]

7. First, a common sense suggestion: The judges themselves felt constrained to note that while they would consent to 6 jurors, they would hesitate to allow a further reduction in size.

Such a statement implies that the jump from 12 to 6 has a zero effect on the verdicts, but the step from 6 to 5 would have an effect. Nowhere in nature or in society do we know of an organism or an institution displaying such strange behavior. The expectation, therefore, is that the jump from 12 to 6 will make a difference, and we will discuss it below. In the meantime, I offer one other point for your consideration.

8. Why, if it makes no difference whether we have 12 or 6-member juries, does your present bill limit the reduction to civil cases? If there is no difference, why not apply the reduction also to criminal cases? Again, the common sense inference is: Of course, it must make a difference, but civil cases are just less important.

9. Parenthetically, allow me to draw your attention to the fact that those among your legislative colleagues who want to reduce also the criminal jury from 12 to 6 have a similar reservation: They do not want to apply it to capital cases. Again the common sense inference from such a reservation is: Of course it makes a difference, but non-capital cases are not important enough to deserve the full treatment.

10. Now, what if any, effect will the jury reduction from 12 to 6 in civil cases have? The jury's preeminent function is to represent the community in the judicial process. If you reduce the jury's size from 12 to 6, the first effect will be on the jury itself: you will make it less representative of the community from which it was drawn. To be sure, everybody knows that 12 jurors cannot really represent the whole community; but however poorly they do it, 6 jurors do it less well. An example will make this clear. Think of a ten percent minority of the population. You might think of the blacks, but you may also think of the Jews, or of very poor people, or of very educated people. You then ask yourself: What

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[1] H. Kalven, Jr. and H. Zeisel, *The American Jury*, Little Brown & Co. (1962). 1971 edition, University of Chicago Press.

[2] * * * And Then There Were None: *The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710 (1971). *Six Man Juries, Majority Verdicts—What Difference Do They Make?* Occasional Papers from the University of Chicago Law School.

[3] See note 2 above on p. 1.

are the chances in a random selection of jurors from this population, of having at least one member of this 10 percent minority on the jury? Simple calculus reveals that, on the average, 72 out of 100 randomly selected 12-member juries will have at least one such minority member. But among 100 juries of 6-members, only 47 will have such a minority representative. Hence, less frequent representation of minorities on our juries is one inevitable result of cutting down their size from 12 to 6. This reduced representation of minorities on our juries is probably a bad thing in itself.

11. But this less representative character of the 6-member jury is bound to also have an effect on the verdicts of these juries: it increases the gamble the litigants take by bringing their case into court. Again, by way of example, it will help if we think of the jury decision in personal injury cases, which form the bulk of the business that comes before our civil juries. In these cases, the individual jurors' differences in perception and evaluation express themselves in different ideas of what constitutes negligence, of how much an injury hurts, and of what an injury is worth. And we know that the final verdict in a case will be somewhere in the middle, some kind of average, of these different evaluations of the individual jurors.

An elementary statistical calculation again reveals that these averages of juror evaluations in comparable cases will fluctuate more in 6-member juries than they do in 12-member juries. The analogy with the Gallup Poll will help. We know that the smaller the size of a sample, the greater will be its margin of error. And here again we learn from calculus that reducing the sample size by one-half (e.g., from 1500 to 750—but also from 12 to 6) will increase the margin of error by some 41 percent. Translated into our jury problem, "margin of error" means wider fluctuations, and hence reduced predictability, and greater gamble, all by a margin of 41 percent, for the litigants that come to court.

And what is true for the size of the damage award is equally true for the verdict on liability: it will be more of a gamble all around. I might add here that reports from trial lawyers indicate that the reduced jury size affects also the relationship between counsel and jury: it is likely to become somewhat more personal, too personal, some of these lawyers feel.

12. The lawyers who now must try their cases before 6-man juries know in their bones that the gamble is too great. And with the trial judge's consent, they are finding a way out of the difficulty. In at least two federal circuits, cases have been tried with 8 jurors. You will ask how; trust lawyers' ingenuity. They selected two alternate jurors and at the end of the trial, stipulated that the two alternates may join the six regular jurors in their deliberations.

13. In this context, I should like to say a word on the proposition collateral to the reduction of the jury's size, namely the proposal to reduce also the number of peremptory challenges available to each side. It seems reasonable enough to assume that if we have 6 jurors instead of 12, we may as well also curtail the number of available challenges. In view of what the jury-size reduction does to the representative character of the jury, I wonder whether one could not argue under these circumstances for an expansion, or at least against a reduction of the present number of available challenges, so as to allow at least for this correction of the mode by which chance will produce odd compositions of the 6-member jury.

14. On balance, it might seem, that the legislators considering the issue would have to weigh the savings of some 4 million dollars annually against the less representative character of the jury and the resulting increase in the gamble the litigants take in bringing their case to court. But this would be a myopic, limited view. One must see the reduction of the jury size in civil cases in the federal courts as but one move in a major attack on the jury system that began in the "law-and-order days," when it was thought that the jury, as we have known it since the founding of the Republic, might stand in the way of law enforcement.

To see the whole picture, you must see that we already have a 6-man jury in criminal cases in some of our state courts, and that following the Supreme Court's decision in Williams v. Florida, there is already a Senate Bill proposing the 6-member criminal jury for federal trials. Nor is this all: majority verdicts in jury trials, well established in civil cases in some state courts, are being proposed for criminal trials. So we may soon have in our courts what we have for the time being only in a remote corner of our law, the military court-martial: a 6-member criminal jury that can reach a verdict with a majority of 5 or 4 jurors with a majority verdict.

In voting for a 6-member jury in federal civil trials, therefore, you are voting for but one of successive moves to diminish the American Jury.

15. After what I have said, I might appear to you to be an advocate of the traditional jury. Allow me to correct this view. I obtained my first legal education in Austria, one of the many countries that know juries only for trials of a small number of major cases, and never had a jury in civil cases. The jury in civil trials has now become almost an American specialty, and I am not at all convinced that it will or should forever remain on our law books. But this is a more serious question that will require much study of how the jury operates and also of what the judges are doing.

What I beg you to consider today is whether now is the right moment to single out the jury for diminution. Our system of justice is at a moment of crisis; aspersions are being cast on almost every part of that system, from the policeman on the beat to the highest officer in the land. Have you heard anything bad about the jury recently? I don't think you have. And would you not, therefore, agree that this might be the wrong time to cut the jury to pieces?

16. Much has been said in recent months about reestablishing the authority of the Congress vis-a-vis the Executive. How about reestablishing the authority of the Congress vis-a-vis the Judiciary? Why don't you help those district courts who so far have refused to cut the size of their juries, and those from whom you have heard this morning, the American Civil Liberties Union and the NAACP, concerned with the reduced opportunity of minorities to be represented on our juries? In short: Why don't you introduce a bill that reestablishes the 12-member jury in all federal courts? Why not share our view that four million dollars is perhaps not the right price for selling one-half of the American Jury?

Mr. ZEISEL. I am here, not as a representative of any institution. I have been a student of the jury system, jointly, with my colleague, Harry Kalven, Jr. I have written what I think is the standard work on the American jury, and I have followed closely the various moves to curtail the jury during these last 2 years.

The argument for curtailing the jury from 12 to 6 rests on the fact that it would save the Federal courts approximately $4 million. Now, that is no small amount but I think it is proper to put it into perspective.

It is a little bit more than 2 percent of the total Federal judicial budget, and a little more than one-thousandth of 1 percent of the total Federal budget.

As to the amount of time saved, Mr. Chairman, the studies I have seen show an absolutely negligible amount of time. There is very little time saved because the voir dire proceedings are now in the Federal courts, as a rule, addressed to the jury as a whole. The judge is mostly the man who conducts voir dire proceedings and it has come to a point where the chief judge of the Minnesota district, who I understand appeared as a witness before you, had to embelish his argument by saying that 6 jurors move quicker to the jury room than 12 jurors. Now, if our judicial system has come down to such saving, I think it is time to have another look.

So, what we have are $4 million.

Now, the argument which is needed to sustain the curtailment is that, in fact, it makes no difference whether a 6-man jury adjudicates the case or whether a 12-man jury adjudicates it. Mr. Morgan and Mr. Jones have referred to my mathematics. I will spare you the mathematics. But, let me just lead you to two commonsense observations. The judges who said they have no objection to the six-man jury in *Williams* v. *Florida* say, well, they would have serious objections to going down further, such as from six to five. Now, I submit to you, gentlemen, that there is no organization, no biological body, nothing

known in nature or society that has no effect if you reduce its size from 12 to 6, and suddenly has an effect if you reduce it from 6 to 5. The ancient Romans knew it. They had a proverb saying, "Nature does not make jumps." And there is an admission of this fact in the hesitancy to apply the six-man jury to criminal cases.

Now, why is there a hesitancy? It comes from the intuitive knowledge that, of course, there is a difference. But, civil cases, for some reason, are not considered quite as important as criminal cases. And even the people who argue for the reduction of the jury in criminal cases have a reservation, namely, for capital cases they do not want it. Now, why do they not want it? Well, they know it makes a difference, but noncapital cases just are not as important.

Now, there was absolutely no talk so far about what difference it makes. I shall spare you here with all due respect, dreadful analysis the U.S. Supreme Court made of the so-called empirical evidence that alleges that it makes no difference whether we have a 12 member or a 6 member jury. Let me just say that one of the pieces of evidence cited by the Supreme Court was the experience of New Jersey where they tried, lo and behold, one case before a 6-man jury and the Clerk of the court said it seemed all right. Now, if this is evidence that it makes no difference, then I think you should have another look.

But there is positive evidence that there is a difference and the evidence comes from some very simple mathematics. First of all, the jury composition will be different. Everybody knows that a 12-man jury cannot represent the whole community, but however poorly 12 members represent the community, 6 members must do a poorer job. There is no mathematics required. And I think of the extreme reduction—how would a jury of one do? The mathematics everyone is talking about is very simple. If you draw randomly from a population where there is a minority of 10 percent, be they black, be they educated people, be they people who are more generous on sexual deviants, or be they people who are very hard on drug users, whatever it is, the laws of probability will show you that on a 12-man jury, 72 out of every 100, 12-man juries will have at least one representative of such a minority. If you have only at least one man jury, only 47 percent of the juries will have a member of this minority. Now, this gives you an idea of the magnitude which we are talking about. The smaller the jury the lesser the chance of a minority to be on that jury. This is what the representatives of ACLU and the NAACP were talking about this morning.

But you may ask, does this make any difference to the verdicts, and again my answer is, yes, it does make a difference on the verdicts. It goes like this: Why is it necessary that the community, that the jury represent the community? Because it turns out that within the community different views obtain as to what an injury is worth. People have different views on it, and they have different views on what negligence constitutes. And if you have 12 jurors, what will happen is some people will have this thought, some people that thought, and in the end the verdict will be somewhere an agreement or compromise between these views. If you permit me to limit the argument for a moment to the question of damages, because after all you are talking about civil cases, of which the bulk is formed by tort cases. We know that at the beginning of the deliberation once liability is

established, the jurors will say, now, how much is this case worth. And then the juror evaluations will form a range from let us say $2,000, $5,000, $10,000 to $15,000, and in the end they will settle down somewhere in the middle of this range.

Now, a point can be made, that will be corroborated by anybody who knows something about jury verdicts, and about statistics, that the smaller the jury the greater the variability of these ranges.

Think of it in terms of a Gallup poll. As you know, these Gallup polls that predict national elections average about 1,500 people at large and then they will say, for instance, 43 percent will vote for candidate X. With that 43 percent goes a margin of error of let us say 2½ percent. If you reduce the sample from 1,500 to 750, you increase the margin of error by 41 percent. And this is exactly what happens when you reduce the jury from 12 to 6. The margin of error will increase, which in lawyers' language means that the gamble will increase if they take a case before a jury. Or, if your concern is with the system of justice you will say that the predictability of the verdict will decrease by that amount. This is what you are really talking about: The lawyers will take a greater gamble in taking a case to the court, and the predictability of the verdict will decrease. That can be documented.

And let me now tell you something that will interest you, especially since Congressman Drinan asked this question. Do you know that now in some Federal courts, although there is no right in these courts to a larger than six-man jury, they try cases before eight-man juries, with the consent of the court and the consent of both lawyers? This is how they do it: By a subterfuge which the law allows them, they appoint two alternate jurors and they stipulate that the alternate jurors may deliberate with the real jurors because the lawyers know down in their bones that there is too much of a gamble in verdicts by six-man juries. If you reduce the size of the jury, you are reducing the representation of minorities, and you are increasing the gamble which lawyers take, when they try these cases. And let me just say that in one rather careful study done in Michigan, in a controlled experiment, this prediction that you increase the gamble was indeed confirmed. I do not want to bore you here wtih details. I have written about them.

Offhand, it might seem, gentlemen, that the question before you is, is it worth $4 million savings to reduce the representation of minorities and increase somewhat the gamble litigants have to take if they come into court? But I think it would be a mistake to look at it this way.

Let me begin one step earlier. The jury system has been under attack ever since its inception. There were always foes of the jury system, but the real attack has begun only approximately at the time when that great Attorney General, John Mitchell, took office. At that point things began and they began in a curious way. When *Williams* v. *Florida* was decided, which deprived the 12-man jury of its constitutional support, the Chief Justice put on his other hat as presiding officer of the Judicial Conference and encouraged the district courts to establish the byrule of court, a 6-man jury. And then in *Williams* v. *Florida*, they said you don't have to worry, after all we have unanimity. But then came another case where the unanimity requirement was abolished so you have now pending legislation in many States

and also in the U.S. Congress, bills not only for reduction of the jury size from 12 to 6 in civil cases, but also in criminal cases, and to combine them with majority verdicts. So, very soon you will have in several States, and if this goes on, I am afraid also in the Federal system what we now have only in one remote corner of our judicial system; namely, in the court-martial. You will remember that Lieutenant Calley was convicted by a jury of six, and, this is the formula, "with four jurors present." They did not even reveal whether the verdict was unanimous or not. And therefore I beg you to see the step you are taking considering one step in a very systematic attack to cut the jury system down.

And now I just want to make two more points:

One is that our system of justice in recent years has come under severe attack at almost every level. There is hardly a big city in which some policemen are not under attack and, the aspersions have reached the highest officer in the land. Have you heard recently anything bad about the jury? I am sure you didn't. Now, why, for God's sake, do you whittle down the one pillar of the system of justice in a time of moral crisis? Is this worth $4 million?

And let me now conclude with just one other point:

If I heard correctly, one of you gentlemen said that you were under a mandate from the Judicial Conference here to sort of equalize the use of six-man juries in civil cases in the Federal courts. As I have told you, I am not sure that this was very proper but that is how it was done.

Gentlemen, may I ask you why do you not introduce a bill to make the 12-man jury obligatory in Federal courts and thereby supersede a rule which should have never been allowed because it was the same Supreme Court who encouraged the rule who then ruled over its legitimacy. I ask you, gentlemen, why don't you reestablish the power of the Congress not only vis-a-vis the executive branch, but also vis-a-vis the judiciary branch which here encroached upon your privilege, and establish and introduce a bill to make 12-man juries obligatory in the Federal court? I think this would be the proper answer to this quite unnecessary and cheap attack on the jury.

In conclusion, may I say, that I received my first legal education in Austria, a country which knows jury trials only for major crimes, and is one of many countries that does not know the jury in civil trals. As you know, even the British Commonwealth has greatly cut down its use of juries in civil cases. I would say that if you would seriously consider at some point later on the abolishment of the civil jury, well, that is an issue that one can talk about. But, to whittle the jury down by bits and pieces, that does not make any sense, gentlemen. As long as you have the jury, leave it in the form which people have come to trust, and which lawyers have come to trust. The $4 million is not enough to warrant such a move.

Thank you.

Mr. Kastenmeier. Thank you very much, Professor Zeisel.

I must say, however, neither Congress nor this committee are under any mandate from any external body to do anything whatsoever.

Mr. Zeisel. No.

Mr. Kastenmeier. I think as to the question you posed, as to whether it might be appropriate to introduce a bill mandating resto-

ration of a 12-man civil jury, I guess we await evidence or complaint of that which has already occurred. And up to today, I am not sure that we have heard much of a complaint about the move in some 66 courts, whether it is experimental or whether it indicates a permanent use of jury of less than 12. You have heard the testimony this morning, and I do not think we have had any other testimony that there has been any miscarriage of justice as a result of the use of the six-man jury throughout the country. At least, it has not reached us.

Mr. ZEISEL. But, what do you call "miscarriage of justice?" What happens is that if a lawyer goes with a case into court, and you ask him what he thinks the jury will do, he will say, "Well, they might do such and such." If you ask him, "Now, suppose you had to try this case 10 different times," he will say that in 3 cases he might not get anything, in some case he might get this or in some case he might get that. Now, if you do this for a 12-man jury, you get one set of figures. If you do this for a 6-man jury, you get a larger range of verdicts.

What you call a miscarriage of justice, that is a different matter again. You are talking here about nuances, but very important ones. The words "miscarriage of justice" is inappropriate but you do increase the uncertainty of the law. That is what you really do.

And as to the lack of complaints before you gentlemen, have you watched lawyers in a court? If a judge says, I want a six-man jury, lawyers who have to try cases before him, cannot always come in and complain because tomorrow they are again in his court. As a matter of fact, I am quite sure, for instance, the plaintiff lawyers have not complained, almost by a political decision, that I am quite sure they have made up their mind that they do not mind the bigger gamble. Why should they care as long as the jury is there to give them the higher reward which, in fact, they get from juries?

There are considerations and considerations. I am here only as a student of the jury system. I have no ax to grind, and the words "miscarriage of justice" would be completely inappropriate for what a reduction from 12 to 6 would do because, after all, in the State of Virginia you could even have a jury of 6, and who is to say this is a "miscarriage of justice" if the lawyers stipulate it?

Mr. KASTENMEIER. Well, I do not know to what extent we can reflect the nuances that you refer to. But, up to this morning, I have not been moved by any urgency in terms of these proposals. The preceding organization——

Mr. ZEISEL. Yes, but why do it? The $4 million are not enough to cut——

Mr. KASTENMEIER. You, sir, are the only one to raise that point.

Mr. ZEISEL. But it is the only argument for it, Mr. Chairman. There is no other argument. It is the $4 million, and there is absolutely no other argument.

Mr. KASTENMEIER. I do not think that is the case.

Mr. ZEISEL. Would you mind enlightening me? I have been studying this question. What else is involved?

Mr. KASTENMEIER. I think the statements made before this committee did not concern themselves with the $4 million.

Mr. ZEISEL. But with what?

Mr. KASTENMEIER. I have no intention of getting into an argument with you, sir. And at this point, I will yield to the gentleman from Maine.

Mr. COHEN. Thank you, Mr. Chairman.

Professor, from where was your statistical information drawn? Was it drawn from State courts or Federal court experience?

Mr. ZEISEL. This is a statement which is drawn from probability theory simply and purely and has nothing to do with the place where you do it. If you take 12-man juries consecutively from a bag of names where 10 percent are——

Mr. COHEN. Of course, there would be a difference, Professor, if you followed from the State court procedures. You have heard some of the people refer to the key man jury system. The Federal court jury system draws from many sources, from the telephone book, voting lists and many other sources, and you get a broader and more expansive list.

Mr. ZEISEL. Yes. But, however, you draw it, if you have 12-man juries, these are the figures which pertain.

Mr. COHEN. OK. Then I assume in using your own statistical, I must say statistical studies since you have done no empirical studies yourself, that if we increase the jury from 12 to 24, let us say, what would that increase your chance of getting a minority person on it?

Mr. ZEISEL. It would——

Mr. COHEN. Eighty-six, from 72 to 86 percent?

Mr. ZEISEL. No. It would reduce it by 41 percent but——

Mr. COHEN. No, no, let us increase. We are going to increase the size of the jury now to 24 or 18. Would not that according to your logic statistical probability, increase the chances for minorities to participate?

Mr. ZEISEL. Yes, of course. Much so.

Mr. COHEN. You would find that certainly satisfactory?

Mr. ZEISEL. No, I wouldn't, Mr. Congressman. The figure 12 has evolved over history as probably the reasonable compromise between a manageable unit and the representation of the community. I differ also on this point with——

Mr. COHEN. Let me just come back. You flatly state that the Supreme Court has made a grave constitutional error in saying the courts could formulate their own rules, and that this is not fixed in constitutional principle of a 12-man jury. And I think you have moved from the area of your own expertise and statistical background to a constitutional expert, which I do not think you are qualified to be.

Mr. ZEISEL. Mr. Congressman, first of all, I have not said it is a constitutional error.

Mr. COHEN. Let me look at your statement. Your statement says "they made a grave error."

Mr. ZEISEL. Well, I have written a paper on it. I am a professor at the law school and I happen also to be a statistician, and I hold to the view that the court erred in assuming that if the jury, if the Constitution says, as it stood at common law, that this does not include the 12 men, but that is a minor matter.

Mr. COHEN. You do not really subscribe to the whole constitutional theory that the Constitution does not evolve itself and it is not fixed and immutable in its principles? You do not subscribe to that view?

Mr. Zeisel. No. Surely, it evolves.

Mr. Cohen. I do not have any further questions.

Mr. Kastenmeier. The gentleman from Massachusetts?

Mr. Drinan. Thank you very much for your statement.

I am glad that I have one more thing now to blame on John Mitchell.

In the case of Colgrove, it is my recollection that it was the insurance company that objected to the rule requiring or mandating six persons, and that they appealed and that the posture of the case before the U.S. Supreme Court was whether they could give to the insurance company the right that they desire. That was the question, was it not?

Mr. Zeisel. Yes.

Mr. Drinan. And they, as I recall from the briefs, wanted uniformity.

Now, going back to the chairman's question, would you know whether or not the ABA or the trial lawyers or the International Association of Insurance Council, do they have any fixed position on Colgrove? Do they want it reversed?

Mr. Zeisel. Well, I do not know. I only know that the defense counsels asked me at one point to go to Springfield and to argue against the reduction of the 12-man jury to 6. And, as a matter of fact, at that point we were able to persuade the legislature to drop that move, yes.

Mr. Drinan. On the question on the right of Congress, I agree with you that they have done this almost behind our backs, so to speak, and I said that to the Federal judge who was here in October. That we took no affirmative action, when they asked us to take action, apparently, some 2, 3, or 4 years ago, and they acquiesced, so to speak, in the appeal of this case. They did not prevent it, anyway, and if the situation is de facto now, would you say that, and could you tell us just how many of the 66 Federal district courts use a 6-man jury, how much of the litigation involved in the entire Nation now is funneled to the 6-man jury?

Mr. Zeisel. Well, in the Nation only a very small percentage.

Mr. Drinan. I mean in the Federal courts alone.

Mr. Zeisel. In the Federal courts alone?

Mr. Drinan. Sixty-six districts.

Mr. Zeisel. My guess it is about two-thirds and it will spread, you know. I mean if the pressure is very great and some of the Federal courts already experiment with six-man juries in criminal cases by stipulation, the next step you will hear is from the Judicial Council that they experimented with six-man juries in criminal cases and "it worked all right." No objection.

Mr. Drinan. Well, one final question, and then I think we have to go.

On a related point that I did not hear you testify, Professor, as to the contention by some people that in a six-man jury the quality of discourse or dialog between the jurors improves and, therefore, the result is more likely to be just.

Mr. Zeisel. That is not correct. There would be——

Mr. Drinan. Some people contend that.

Mr. Zeisel. I have studied this and there will be a paper published on this. This is a contention that is not correct. On the contrary. The lawyers rightly have the impression that a 6-man jury is more domi-

nated by one strong person than 12-man juries. It is all the other way around.

Mr. Drinan. Is there any strong argument, however, aside from the financial for the six-man jury? What is the strongest argument they have? Just for the sake of argument they must have something.

Mr. Zeisel. Congressman, I do not know. I heard only two arguments. The one is save money and the other is save time. The time argument is absolutely wrong and the money argument is quite clear. It is $4 million.

Mr. Drinan. Thank you very much.

Mr. Zeisel. You are very welcome.

Mr. Kastenmeier. This concludes our hearings on six-person juries and legislation relating to the abolishment of the three-judge district court.

Until we meet in markup session on these bills, the committee stands adjourned.

[Whereupon, at 12:20 p.m., the hearing was adjourned.]

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